92-63

Supreme Court, U.S.
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NO. 92 -

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

Frontier Pilots Litigation Steering Committee, Inc.,

Petitioner,

v.

Continental Airlines, Inc.
Continental Pilots Merger Committee,
People Express Pilots Merger Committee,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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July 9, 1992

Questions Presented For Review

1. Whether the Court of Appeals and the District Court invaded the jurisdiction accorded to arbitration in violation of the decisions of this Court and other Courts of Appeal by ruling that the federal judiciary -- rather than an arbitrator -- should determine the effect of a prior arbitration award on a subsequent arbitration proceeding in circumstances where:

-- The ruling denied the pilots of one carrier (Frontier Airlines) involved in a seniority integration arbitration with a major U.S. airline (Continental Airlines) and deregulation start up airline (People Express Airlines) of the fair and equitable seniority integration mandated by the underlying arbitration agreement, resulting in permanent career

damage to the Frontier pilots whose 1955-68 hired captains were inserted on the integrated list as a class far junior to the 1980-83 hired People Express captains despite their vastly greater length of service and other superior pilot equities; and

-- The arbitrator admitted that but for the District Court's intrusion into the arbitration process he would have ruled in a manner far more favorable to the former Frontier pilots insofar as their placement on the integrated seniority list.

2. Whether, in the same circumstances, the District Court and Court of Appeals abandoned their limited but proper role in reviewing arbitration awards by ignoring a gross violation of the District Court's own order prohibiting ex parte contacts between the

arbitrator and a representative of one of the parties which occurred at a critical juncture in the decision making process.

List of Parties to Proceeding

The parties to this proceeding are the following:

1. People Express Merger Committee

2. Continental Airlines[1]

3. Frontier Pilots Litigation Steering Committee

4. Continental Pilots Merger Committee[2]

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1 Texas Air Corporation was at the time the action was filed the parent company of Continental Airlines.

2 Frank Shanley, who appears in the caption of the Third Circuit judgment order, was replaced by the Continental Pilots Merger Committee.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioner respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The Order of the District Court compelling arbitration in this case is not officially reported but is reprinted in the Appendix at pp. 1a-15a.

The Order of the District Court confirming the Ross arbitration award is not officially reported, but is reprinted in the Appendix at pp. 16a-57a.

The Order of the Court of Appeals affirming the District Court's order is not officially reported, but is reprinted in the Appendix at pp. 58a-60a.

The Order of the Court of Appeals denying rehearing and rehearing in banc is not officially reported, but is reprinted in the Appendix at pp. 61a-63a.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on

February 13, 1992. A timely petition for rehearing and suggestion for rehearing in banc was denied on April 10, 1992, and this petition for certiorari is being filed within 90 days of that date.

The Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

Statute Involved

The statute involved is The United States Arbitration Act, 9 U.S.C. § 16(a)(1)(D), which provides:

> An appeal may be taken from --
>
> (1) An order --
>
> . . .
>
> (D) Confirming or denying confirmation of an award or partial award . . ."

Statement of the Case

This case arises from a lawsuit initiated by the People Express Pilots Merger Committee (PEX pilots) against Continental Airlines (CAL) seeking, inter

alia, an order compelling arbitration of the issue of pilot seniority integration. The issue arose because of a transaction in late 1986 by which CAL acquired People Express, Inc. As a part of that transaction, CAL had filed a Labor Protection Agreement (LPA) with the Department of Transportation. The LPA was an agreement between CAL and People Express, Inc. providing for a fair and equitable pilot seniority arbitration with respect to pilots employed by CAL and pilots "of the air carrier subsidiaries of" People

Express, Inc.[1]. At that time, the two air carrier subsidiaries of People Express, Inc. were People Express Airlines and Frontier Airlines.

As a condition precedent to the acquisition by CAL of People Express, Inc., CAL acquired Frontier Airlines (FAL) and all of its common stock. In connection with that transaction, CAL required all FAL pilots to execute a document called the Job Preservation

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1 The exact terms of the LPA provided that:

> Following consummation of the aforesaid Merger Agreement, in the event of a future merger of airline operations involving any air carrier subsidiary of People Express, Inc., provision shall be made for fair and equitable seniority, integration procedures ... which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a neutral mediator ....

Agreement (JPA). Side Letter 2 of the JPA provided, inter alia, for a seniority integration arbitration, and imposed conditions to the effect that the arbitrator was to take special note of the fact that Frontier was not operating at the time of the acquisition and that the arbitrator should recognize the promotional expectations of Continental pilots to aircraft on order or on firm option to CAL as of September 15, 1986.

An arbitration took place pursuant to the JPA before Arbitrator George Nicolau who issued his decision on June 15, 1987. In that decision in which Arbitrator Nicolau noted the JPA's "considerable and obvious tilt in favor of" the CAL pilots, Arbitrator Nicolau placed all FAL captains, regardless of their length of service junior to the most

junior CAL captain.[2] Later in 1987, CAL unilaterally integrated the PEX pilots into the Nicolau list and placed the 1980-1983 hire PEX captains below (or junior to) the 1955-1968 hire FAL captains.

Meanwhile, the PEX pilots' suit to compel arbitration under the LPA went forward, and on December 9, 1988, the Frontier Pilots Litigation Steering Committee (FAL pilots) was granted intervention in order to protect their interests as one of the two air carrier subsidiaries of People Express, Inc. who were entitled to the protection of its terms.

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2 The FAL pilots subsequently sought unsuccessfully to vacate Arbitrator Nicolau's Award under the traditional grounds for vacating an arbitration award under the Federal Arbitration Act.

With all relevant and needed parties then before it, the District Court, after a bench trial, issued an order on August 7, 1989 compelling arbitration. The order compelling arbitration tracked the provisions of the LPA and commanded that:

> The neutral shall consider any factor relevant to a fair and equitable integration of the seniority lists of the People Express, Frontier and Continental pilots. The parties are free to urge the neutral to consider any factor, and put in evidence any support, that they believe is relevant to this standard.

(Appendix, pp. 8a-9a)

In an apparent contradiction to the above-stated standard, the District Court, over the vigorous objection of the FAL pilots, inserted the following language in its order compelling arbitration:

> The Frontier Pilots Litigation Steering Committee's participation in this arbitration shall be circumscribed by the Final Award of Arbitrator George Nicolau, dated June 15, 1987. FAL may not assert a position inconsistent with that Arbitration Award but shall, for the purposes of this arbitration, be deemed bound by that Award. The Award of Arbitrator Nicolau is currently under appeal. In the event, at any time prior to the Final Arbitrator's Award in this matter, the decision of Arbitrator Nicolau shall be reversed or modified, any party may make application to this Court, on short notice, to consider the impact of that determination upon this arbitration proceeding.

(Appendix, pp. 2a-3a)

Subsequent to the issuance of the order, the FAL pilots requested reconsideration of this provision of the order based on the uniform line of cases in the Third Circuit and others that it is for the arbitrator, not the federal judiciary, to determine what weight, if any, is

to be accorded a prior arbitration award in a subsequent arbitration proceeding.

When the District Court refused reconsideration, the FAL pilots requested that he certify this issue for interlocutory appeal in order to avoid going through a lengthy and costly proceeding only to have it reversed on appeal. The Court rejected this request. After, nevertheless, appealing to the Third Circuit, the FAL pilots agreed to withdraw their appeal because of the lack of finality of the District Court's order, and the Clerk's office dismissed the appeal on October 11, 1989.

Prior to the hearing before Arbitrator Ross, CAL filed a "Motion in Limine" in which it requested that Arbitrator Ross formally rule that the FAL pilots should be bound by the Nicolau Award. Arbitrator Ross granted CAL's motion over

the objections of the FAL pilots. The FAL pilots made one last request to the District Court to change its ruling by appealing the decision of Arbitrator Ross granting CAL's motion in Limine. Once again, the District Court adhered to its ruling, and 73 days of hearings before Arbitrator Ross commenced.

The several efforts of the FAL pilots to reverse the District Court's circumscription language before the hearing were based on their fear (correctly founded, as it turned out) that the Court of Appeals might -- if the lengthy hearing went forward -- ignore the relevant law and sweep the errors under the rug on the misguided belief that the matter should be concluded -- whatever the errors that occurred.

During the post-hearing but pre-decision phase of the proceeding, Arbitrator Ross admitted (1) that the FAL pilots were poorly treated in the Nicolau Award; (2) that the FAL pilots had superior equities to the PEX pilots; (3) that he did not apply the fair and equitable standard in the LPA in comparing the equities of the FAL and PEX pilots; (4) that if he had compared such equities, the FAL pilots would be moved up higher on the integrated list; (5) that the Nicolau "caveat" in the Court's order compelling arbitration prevented him from moving up the FAL pilots on the integrated list; (6) that the FAL pilots would have been better off if they had never showed up to participate in the arbitration; and (7) that the FAL pilots -- and only the FAL pilots -- had "really

taken gas" in his arbitration proceeding.

Also during the post-hearing but pre-decision phase of the proceeding called the technical support committee phase of the proceedings where all parties except their counsel were present and were discussing the heart of the case -- how the lists would be integrated -- an admitted ex parte contact occurred between the arbitrator and the chairman of the PEX Pilots Merger Committee.

Paragraph II.8(c) of the District Court order compelling arbitration stated:

> Communication with Neutral. Neither Continental nor the committees may communicate with the neutral, either formally or informally, outside the presence of the other parties, except in writing, with copies to the other parties, provided, however, that any party electing not to be present for a

> meeting or hearing date waives any right to be present for such communications.

(Appendix, p. 13a)

On July 12, 1991, two issues vitally affecting the FAL pilots were being discussed. First, whether the ratio of PEX-CAL captains would be extended down to the most junior FAL captain (more favorable to the FAL pilots) or would end prior to the most senior FAL captain, thus making all FAL captains the junior captains on the airline; and, second, whether the ratio of PEX captains would start at CAL pilot #1040 or at some point above that.

On the same day, the PEX technical support committee members threatened to withdraw from further participation in the technical support process and Arbitrator Ross requested that committee to reconsider.

Later that day, Arbitrator Ross and PEX merger committee chairman Mackenzie had a closed door, ex parte meeting lasting between 15 and 30 minutes.

Immediately after the conclusion of that ex parte meeting when all members of the technical support committee met together in joint session, Arbitrator Ross informed the committee members that he had reached a conclusion on the two issues specified above vitally affecting the interests of the FAL pilots and both decisions favored the interests of the PEX pilots and were detrimental to the interests of the FAL pilots.

When these decisions favoring the interests of the PEX pilots were announced, the PEX committee members did not follow through on their threat to boycott the technical support committee

meetings, and they attended all such meetings that followed.

The FAL pilots timely raised the issue of the July 12, 1991 ex parte communication in their letter to Arbitrator Ross on July 14, 1991, and in their request of August 12, 1991 that he recuse himself.

On August 13, 1991, Arbitrator Ross refused to recuse himself. His letter did not deny that the ex parte contact occurred, but claimed rather that no issue under litigation was discussed.

On August 13, 1991, Arbitrator Ross issued his decision. In his decision, Arbitrator Ross completely inverted the Company's alignment of PEX and FAL captains on the Company's list and placed the 1980-1983 hire PEX captains as a class not only above, but hundreds of numbers above the 1955-1968 hire FAL

captains, thus making these veteran FAL captains the most junior captains on the entire CAL system, and thereby subjecting them to the worst schedules and other working conditions and making them the first to be downgraded from captain to first officer in the event of a contraction in flying.

After the award issued, the PEX pilots immediately sought confirmation of the award in the District Court. The FAL pilots moved that the award be rejected.

On November 22, 1991, the District Court entered an order confirming the Ross Award and followed it with a twenty-three page letter opinion on November 26. (Appendix, pp. 16a-57a)

Thereafter, the FAL pilots moved the Third Circuit for a stay pending appeal which was initially granted on December 5, 1991 after the Court had received the

opposition papers of Continental and the PEX pilots. On the next day, Continental filed an emergency petition for rehearing and clarification of the stay order. That petition was granted ex parte in an oral order issued at approximately 8:30 p.m. on Friday night, December 6, 1991. When the FAL pilots filed their opposition -- as the Court had directed -- at 3:55 p.m. on Monday, December 9, 1991, the Court rejected the FAL pilots opposition and confirmed its Friday night oral order by written order issued at 5:19 p.m. on December 9, 1991.

The appeal was nevertheless expedited and oral argument was heard on Monday, February 10, 1992. On Thursday, February 13, 1992 the Third Circuit entered a brief judgment order affirming the judgment of the District Court. (Appendix, pp. 58a-62a)

On April 10, 1992 the Third Circuit denied the FAL pilots motion for rehearing and/or for rehearing in banc. (Appendix, pp. 61a-63a)

Reasons for Granting the Writ of Certiorari

This case presents the Court with a unique opportunity to exercise its supervisory powers to correct two unfortunately common departures from the accepted and usual course of judicial and arbitral proceedings which also are in conflict with the decisions of this Court and the other circuit courts of appeal.

The first departure is the activist encroachment of the District Court, with the approval of the Third Circuit, on jurisdiction committed by this Court and the Courts of Appeal to the realm of arbitration. Specifically, the District Court encroached on this area when its

order compelling arbitration required the subsequent arbitrator to be "bound" by the prior arbitration award of Arbitrator Nicolau.

The second departure is the abject failure of the District Court, with the approval of the Court of Appeals, to exercise its limited supervision over the arbitration process to require that arbitrator abide by court ordered prohibitions against ex parte contacts. This failure also placed the Third Circuit in direct conflict with a recent decision of the Ninth Circuit upholding bans on ex parte contacts.

In short, we have a case here where the Court first wrongfully intruded into the arbitration process and, second, failed to act when its own order against ex parte contacts was blatantly defied.

I.
The Judicial Requirement That A Subsequent Arbitrator Be Bound By The Decision Of A Prior Arbitrator Is Contrary To Decision Of This Court, The Third Circuit And Other Courts Of Appeal And Such Intrusion By The Judiciary In Substantive Issues Committed To The Arbitration Process Is A Recurring Problem In The Labor Arbitration Process That This Court Should Address And Correct

Over thirty years ago, this Court defined the respective roles of the federal judiciary and arbitrators in labor arbitration and held that the role of the federal judiciary was to be minimal.

In United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), this Court specifically rejected a claim that federal courts could reject arbitration as a means for settling a dispute because the lower court had determined that the provision involved was "beyond

dispute" as to its meaning (363 U.S. at 567). Instead, the Court held:

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

363 U.S. at 568. And, finally:

> When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

363 U.S. at 569.

This principal was forcefully reiterated by this Court in AT&T Technologies v. CWA, 475 U.S. 643, 649-650 (1986), where the Court held:

> The third principle derived from our prior cases [the Arbitration Trilogy] is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration,

> a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." American Mfg. Co., 363 U.S. at 568 (footnote omitted).

Ironically, the Third Circuit Court of Appeals has had a number of opportunities to apply the unequivocal language of this Court in the Steelworkers Arbitration Trilogy to deny claims that the judiciary should meddle in the arbitration process when a party states that a

current arbitration is, or should be, governed in whole or in part by a previous arbitration award.

The leading case in the Third Circuit specifying the respective role of the judiciary and the arbitrator in such circumstances is Local 103, IUE v. RCA Corp., 516 F.2d 1336 (3rd Cir. 1975).

In that case, the arbitration provision actually provided that, "[i]n no event . . . shall the same question [or issue] be the subject of arbitration more than once." Id. at 1338. A dispute arose in 1971 concerning a job classification decision. The Union claimed that the 1971 issue had been previously decided in a 1946 arbitration award. The Union then suspended its participation in the 1974 arbitration regarding the 1971 grievance and sought to enjoin RCA's

further arbitration efforts. The district court "held that the question or issue presented and resolved in 1946 was not identical to the question or issue presented in 1971," Id. at 1339, and thus dismissed the suit. The Third Circuit held:

> Although we affirm the judgment of the district court, we do so for a different reason: It is the function of the arbitrator, not the court, to decide whether the "same question or issue" had been the subject of arbitration within the meaning of the collective bargaining agreement.

Id. at 1339.

By so holding, the Court expressly disassociated itself from the "strict identity" test utilized by the District Court and arguably found in prior decisions of that Court.

In an oft-quoted epilogue to the Local 103, IUE case, the Court specifically answered all of the claims by the respondents and the contention of the District Court in this case that the FAL pilots were attempting to "collaterally attack" the Nicolau award and relitigate the issues in that case in the Ross arbitration.

> The union evidences the fear that prior decisions will be relitigated ad infinitum presaging a demise in finality and opening the door to abuse. We disagree. Open to the union, before the arbitrator, is the same contention it has presented to the courts, i.e., that the "same question or issue" was previously "the subject of arbitration." So viewed, finality, consistent with the provisions of the agreement, will be preserved.

516 F.2d at 1341.

The situation here is even more compelling than the Local 103, IUE case. Here, unlike that case, the LPA contained

no provision that issues previously settled in prior arbitrations should not be the subject of arbitration more than once. The LPA was totally devoid of any language concerning prior arbitration awards. To the contrary, the LPA specifically applied to pilots of air carrier subsidiaries of People Express, Inc. and the District Court specifically found that both PEX and FAL were such air carriers. The scope and charter of the LPA were broad. Absent agreement among the parties, the issue of pilot seniority integration was to be resolved in a "fair and equitable" manner through arbitration. With the pilots of three carriers involved in the LPA arbitration, it was inevitable that one of the issues <u>for the arbitrator</u> was the impact or effect, if any, of the preceding Nicolau Award. Nothing in the Nicolau Award or the LPA

purported expressly or by implication to exclude from the arbitrator the issue of the impact or effect of that Award. There is, therefore, no evidence at all, much less "forceful evidence" of an intent to exclude the issue of the Nicolau Award from the Ross Arbitration.

Moreover, even if the "strict identity" of issues test were still in place, the District Court's intrusion into the arbitration process would still be unauthorized because the issues in the Nicolau Award (the integration of FAL and CAL pilots on a single seniority list) were admittedly different than the issues in

the Ross arbitration (the fair and equitable integration of the FAL, CAL and PEX pilots).[3]

The Third Circuit reiterated the principles of the Local 103, IUE case, supra, in Westinghouse Broadcasting v. Local 804, 616 F.2d 97 (3rd Cir. 1980), where the Court, after noting the rubric that the issue of arbitrability is for the Court, not the arbitrator, stated:

> We did decide in Local 103 that it is for the arbitrator, and not the court, to decide whether the question or issue presented before an arbitrator in 1971 had previously been submitted before another arbitrator in 1946.

Id. at 100.

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3 On this much, the FAL pilots and the District Court agree ("The question or issue before Arbitrator Ross was clearly not the same question or issue which was the subject of the Nicolau arbitration") (Appendix, pp. 49a-50a).

The next year, the Third Circuit once again revisited this issue in United Mine Workers of America v. Consolidation Coal Co., 666 F.2d 806 (3rd Cir. 1981). In that case, the union filed suit seeking to avoid arbitration and to enforce a prior "settlement agreement" between it and the company regarding the contracting out of repair and maintenance work. The Court held that the issue of the status of the prior settlement agreement was, itself, a matter for the arbitrator to rule upon, stating:

> Federal courts are bound to exercise the utmost restraint to avoid intruding on the bargained-for method of dispute resolution and when enforcement of an arbitration award or settlement agreement is sought under Section 301, the court must be able to say "with positive assurance" that the award or settlement was intended to cover the dispute. If the court has any doubt, the parties should be returned to

> their grievance procedure and arbitration, for it is an arbitrator, and not the court, who is to decide whether the same issue has already been resolved in an earlier proceeding.

Id. at 811 (footnotes and citations omitted).

In other words, the heavy burden on the respondents and the District Court was to find "positive assurance" from the Nicolau Award or the LPA that the Nicolau Award was intended "to cover the dispute" involved in the Ross arbitration. If the Court had "any doubt" on this matter, the issue of the effect of the prior Nicolau Award on the subsequent Ross arbitration should have been resolved by the arbitrator, "for it is the arbitrator, and not the court, who is to decide whether the same issue has already been resolved in an earlier proceeding."

The practical difficulty of concluding, as a matter of law, that a court has "positive assurance" that a prior arbitration award is binding upon a forthcoming arbitration becomes an impossibility when the Nicolau Award contains no reference to future arbitrations and the LPA contains no reference to prior arbitrations.

There is yet another line of cases in the Third Circuit holding generally that an arbitrator need not follow previous arbitrations.[4] In Metropolitan Edison Co. v. NLRB, 663 F.2d 478 (3rd

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4 Indeed, even Arbitrator Ross noted that "arbitration decisions generally are reviewable by, and not binding on, other arbitrators." Arbitrator Ross further found, however, the District Court's order in effect superceded this general rule and required him to give binding effect to the Nicolau Award.

Cir. 1981), aff'd 460 U.S. 693 (1983), this Court held:

> The narrow issue before us is whether we are bound by the previous arbitrated interpretations. We hold that we are not.
>
> Normally an arbitrator need not follow previous arbitrations construing the same agreement. See New Orleans Steamship Association v. General Longshore Workers, 626 F.2d 455, 468 (5th Cir. 1980), cert. granted sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association, 450 U.S. 1029, 101 S. Ct. 1737, 68 L.Ed.2d 223 (1981); Riverboat Casino, Inc. v. Local Joint Executive Board, 578 F.2d 250, 251 (9th Cir. 1978) (to require adherence to previous arbitration would reduce flexibility of the arbitral process). It follows that when this court is called upon to construe a collective bargaining agreement, it need not follow a previous arbitral interpretation. To bind this court to a contractual interpretation made in a previous arbitral award would not be consistent with what the parties bargained for: arbitration as a dispute resolution

> process for specific grievances. See NLRB v. Pincus Brothers, Inc.-Maxwell, 620 F.2d 367, 374 (3rd Cir. 1980).

Id. at pp. 483-84.

Here, the general rule applies because the arbitration agreement (the LPA) "does not provide that one arbitration is to be bound by an earlier decision" (Ibid.).

The Third Circuit in Butler Armco Independent Union v. Armco, Inc., 701 F.2d 253 (3rd Cir. 1983), brought together the two strands of its Local 103, IUE line of cases with the Metropolitan Edison line of cases.

In that case, the union sought to enjoin the Company's action in consolidating seniority units based upon a prior arbitration award allegedly prohibiting such action and a provision in the grievance/arbitration agreement prohibiting

re-arbitrations of the same issue or dispute. The Court held that:

> Although not entirely free from doubt, it appears that the union relies on two theories. First, it maintains that the current dispute is not arbitrable simply because the same issue has been resolved in a prior arbitration. This argument would appear to be foreclosed, however, by our holding in Metropolitan Edison v. NLRB, 663 F.2d 478 (3rd Cir. 1981), cert. granted, 457 U.S. 1116, 102 S.Ct. 2926, 73 L.Ed.2d 1327 (1982), that, absent contractual language to the contrary, one arbitrator's interpretation of a collective bargaining agreement is not binding on a subsequent arbitrator. Second, the union urges that the rearbitration clause in the contract renders the current dispute not arbitrable.

Id. at p. 255.

The Court then held that the second argument was foreclosed by the Local 103, IUE case, noting that in that case the arbitration agreement also contained "a broad ban on re-arbitration" (Ibid.). As

noted above, the language of the arbitration agreement in this case contains no language prohibiting re-arbitration of prior arbitration awards. It is totally silent on this point.

The decisions of other circuit courts of appeal have generally adopted the same rule on the effect of prior arbitration awards on a subsequent arbitration. For example, in Little Six Corp. v. UMW, 701 F.2d 26, 29 (4th Cir. 1983), the Court held:

> Not only do the Company's authorities wilt under examination, but there is solid, well-reasoned case law holding that the preclusive effect of a prior arbitral award is itself a question for arbitration. In addition to the Third Circuit cases mentioned above, the Fifth Circuit has stated that "[w]hether [a prior] award can be given an effect akin to res judicata or state [sic] decisis with regard to future disputes ... neither the district court nor this court should decide. If the parties do not agree,

> that issue itself is a proper subject for arbitration." New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455, 468 (5th Cir. 1980), aff'd sub nom. Jacksonville Bulk Terminals, Inc. v. Int'l. Longshoremen's Ass'n., ___ U.S. __, 102 S.Ct. 2673, 73 L.Ed.2d 327 (1982). The First Circuit also has endorsed this position in a recent decision. See Boston Shipping Ass'n v. Int'l. Longshoremen's Ass'n, 659 F.2d 1 (1st Cir. 1981). The district court below in the present case considered the question and adopted the view of the Third and Fifth (and now First) Circuits. We agree.

In Westinghouse Elevators v. SIU de Puerto Rico, 583 F.2d 1184 (1st Cir. 1978), the First Circuit specifically rejected an argument that a subsequent arbitrator was bound by the decision of a previous arbitrator. The rationale of that court rested on a classic arbitration case[5] defining the difference

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5 Federal Bearings Co., Inc., 22 L.A. 721, 725-727 (1954).

between arbitration awards and judicial precedents:

> Prior awards do not constitute "judicial precedents" in future cases, unless the parties agree that they should. The legal doctrine of "judicial precedents" does not apply to the arbitration process. It prevails under the "common law" judicial system. That legal doctrine, in effect, cautions the courts against declaring wrongful that which custom and usage has sanctioned and which the weight of judicial authority has approved. Under that doctrine, legal principles of contract construction, which have been distinctly enunciated, have been given the force of law. Court decisions and judgments are thereby accorded authoritative weight as "legal precedents" in determining similar principles in future cases.
>
> Arbitrators' awards do not have a corresponding authority or force; they are not accorded the weight of "judicial authority" in determining future controversies, even between the same parties or over the same issues. They are not conclusive or binding upon an arbitrator in subsequent cases. In arbitration, all questions of

> fact and law are deemed to be referred to the arbitrator for decision. Unless restricted by the contract, or submission agreement, or an applicable state statute, the arbitrator is not bound by the strict rules of law or evidence. As long as the arbitrator keeps within his jurisdiction, he can decide the issues submitted to him, notwithstanding any prior awards between the parties, unless the parties have agreed otherwise.

583 F.2d at 1187 (emphasis added). Accord, Connecticut Light & Power Co. v. Local 420, IBEW, 718 F.2d 14, 20 (2d Cir. 1983) ("Principles of stare decisis and res judicata do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings"); Riverboat Casino, Inc. v. Joint Executive Bd., 578 F.2d 250, 251 (9th Cir. 1978) ("Absent a provision in the contract to the contrary, the arbitrator could reasonably conclude that strict adherence to

stare decisis would impair the flexibility of the arbitral process contemplated by the parties").

In a more recent case, the Seventh Circuit Court of Appeals in Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1162 (7th Cir. 1990), ruled that a company's claim that it would not arbitrate a claim because of the "res judicata" and "preclusion by prior judgment" doctrines was a "piffle." As that Court stated:

> Arbitrators frequently interpret the scope and binding effect of earlier arbitral decisions.

Ibid.

The fact that the Nicolau Award was, in accordance with the agreement preceding it, to be "final and binding" on the parties to that award does not provide "the most forceful evidence" that it should have been given preclusive effect

by the district court in the Ross arbitration. This same issue was presented to the Second Circuit in Transit Mix Concrete Corp. v. Local 282, 809 F.2d 963 (2d Cir. 1987). There the Court stated:

> [S]ince the arbitration clause encompasses the present dispute, it follows that the present dispute is arbitrable. Since the arbitration clause makes arbitrable any dispute "concerning the interpretation [or] application" of the CBA, it follows that questions as to the applicability of the finality clause -- in the sense of whether the Lippman award adjudicated the issues raised in the present dispute -- or as to its effect -- in the sense of the res judicata effect of the Lippman award -- are assigned, at least in the first instance, to the Panel or the impartial arbitrator. Under these circumstances, we find it neither necessary nor appropriate for us to decide the extent, if any, to which the Lippman award resolved the issues in the present dispute.

Id. at p. 969-970 (footnotes and citations omitted).

The Court cited the Butler Armco case, supra, as a "persuasive" precedent for its holding.[6]

The decision of the District Court on this issue was as curious as it was indefensible. After noting the holdings of this Court in the Local 103, IUE and Westinghouse Broadcasting cases, the District Court stated:

> The above Third Circuit cases relied upon by Frontier are clearly distinguishable from this case. The question or

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6 See also Hotel Ass'n of Washington v. Hotel & Restaurant Employees Union, ____ F.2d ___ (D.C. Cir. 4/28/92) ("The 'final and binding' clause does not so unequivocally import the principle of precedent into arbitral decisionmaking that Arbitrator Cass was obliged expressly to consider it lest his decision fail to draw its essence from the contract").

> issue before Arbitrator Ross was clearly not the same question or issue which was the subject of the Nicolau arbitration. The issue before Arbitrator Nicolau was the integration of the FAL pilot seniority list with the Continental pilot list after the merger. The issue before Arbitrator Ross was the integration of the PEX pilots with the list of Continental and FAL pilots comprised [sic] by Arbitrator Nicolau.

(Appendix, pp. 49a-50a) The answer to this observation is that to the extent the dispute or issues in one arbitration differ from those in a prior arbitration, there should be <u>less</u> judicial meddling in terms of binding a subsequent arbitrator by the terms of prior arbitration than is the case where there is an alleged "strict identity" of issues between the prior arbitration and the subsequent arbitration.

The real thrust of Judge Politan's decision in this respect was his determination that he would not allow the FAL pilots to engage in a "collateral attack" on the Nicolau Award. (Appendix, p. 51a)

But, as is evident from the line of Courts of Appeals cases previously cited, every party -- whether labor or management -- who believes it has been the recipient of a favorable prior arbitration award will seek the federal court's help on the basis of avoiding "relitigation," or "collateral attacks" on the prior favorable arbitration ruling. And the consistent answer of the Courts of Appeal has been to tell the parties that they may argue the issue of collateral attack or relitigation to the arbitrator, but is is not for the court to decide. If a party could involve the federal

judiciary in determining the effect of a prior arbitration award on a subsequent arbitration by invoking the accusation of "collateral attack" or "relitigation," the federal courts, contrary to consistent rulings of the Courts of Appeal, would be in the business of regularly determining the effects of prior arbitration awards on subsequent arbitration proceedings. This is a burden the federal judiciary should not have to bear.

The error of law by the District Court had a clear and dramatic effect on the outcome of the Ross Award. In the post-hearing but pre-decision meetings of the technical support committee, Arbitrator Ross made the following observations:

> FAL pilots should have been treated better by Nicolau. If I were comparing equities, I would have to come down on the side of the FAL captains. No

> comparison, the FAL pilots have higher equities. . . . Were it not for the restraints on us, I [Ross] would have treated the FAL pilots differently.
>
> In other words, Bob [Williams], you look at what the FAL guys had, their length of service, their turnkey operation, they had as far as I'm concerned -- if I would have been George Nicolau . . . they [FAL] captains would have been treated better.
>
> If I would be free to apply the fair and equitable standard to you guys [FAL], you bet you ass you'd be up higher, but they won't let me move you. The Court won't let me move you up.

If one were to seek a textbook example of a clear cut case of judicial interference with the bottom line result of a labor arbitration proceeding, it would be hard to imagine a stronger case than the present one.

As the quotes of Arbitrator Ross demonstrate, the District Court's requirement that the FAL pilots be bound by

the prior Nicolau Award resulted in the FAL pilots being deprived of the only forum in which their seniority equities could be compared on a fair and equitable basis with the seniority equities of the PEX pilots. Far from seeking a "second bite at the apple" the District Court effectively prevented the FAL pilots from their first and only bite at the apple of FAL/PEX pilot equity comparison which the FAL pilots were unequivocally promised under the LPA as pilots of "an air carrier subsidiary at People Express, Inc."

II.
To Protect The Integrity Of The Arbitration Process And The Parties To It, This Court Should Direct The Federal Courts To Uphold Court Imposed Bans On Ex Parte Communications Between Arbitrators And Parties To Arbitrations And Resolve A Conflict Between The Third Circuit And The Ninth Circuit Court Of Appeals

As noted in the statement of the case, the District Court ordered a specific prohibition on contacts between the arbitrator and the parties. The ban by its terms did not apply to such contacts only when they were shown to prejudice a party. Such contacts were banned unconditionally.

This blanket prohibition of communications goes well beyond the admonitions

contained in 9 U.S.C. § 10(c) where the Arbitration Act provides for the vacation of an arbitration award when the "arbitrators were guilty of . . . any misbehavior by which the rights of the party have been prejudiced." Under even this obviously less rigorous statutory standard, Courts of Appeal have vacated arbitration awards where the arbitrators have engaged in ex parte communications. Totem Marine Tug & Barge v. North Am. Towing, 607 F.2d 649, 653 (5th Cir. 1979). See also, U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 539 (D.C. Cir. 1978).

In some 9 U.S.C. § 10(c) cases in which communications have been involved, the courts have required the party urging rejection of the award to show that the communication prejudiced them. See, e.g., Mutual Fire, Marine & Inland Ins.

Co. v. Norad Reinsurance Co. Ltd., 868 F.2d 52 (3d Cir. 1989).

While we will demonstrate below that the communication prejudiced the FAL pilots, it should be clear from the outset that the unequivocal order against contacts in Para. II.8(c) of the District Court's order did not require a showing of prejudice. If it did, the order should have contained a second proviso stating words to the effect "and provided further that any party may communicate directly with the arbitrator so long as no other party is prejudiced by such communication."

In this background, the District Court found during oral argument on the cross motions to confirm and reject that "In my judgment, the arbitrator -- seems to me had an ex parte conversation." Yet the District Court ignored its own order

banning ex parte contacts by citing the self serving letter of the arbitrator and the affidavit of the PEX pilot representative that their meeting related only to the continued participation of the PEX Committee in the arbitration process, and that:

> There is absolutely no evidence before this court to indicate that the conversation between Captain Mackenzie and Arbitrator Ross related to the substance of what transpired at the Technical Advice Committee meeting.

Appendix, p. 32a.

The undisputed evidence, as shown in the statement of the case, disclosed that immediately after the meeting the Arbitrator announced to the parties that he had reached a conclusion on two issues vitally affecting the Frontier pilots and both decisions were detrimental to the interests of the Frontier pilots and

favored the interests of the People Express pilots who engaged in the contact. The District Court simply ignored this compelling evidence.

Finally, the District Court erred in stating that "this conversation was in full and open view of the other parties' representatives" (Appendix p. 33a). Only lay persons attended the technical support committee hearings. The evidence was that Captain Mackenzie and Mr. Ross conducted the meeting in a room by themselves with the door closed with no other parties invited. To suggest that other lay persons observing this conduct should barge into the room where this private conversation was going on is ludicrous.

The view of the District Court and the Third Circuit that there must be direct evidence that the neutral and the party discussed issues under litigation

is in sharp conflict with a recent decision of the Ninth Circuit rendered after the decision of the District Court, but before the decision of the Third Circuit.

In Pacific & Artic Ry. & Nav. Co. v. United Transportation Union, 952 F.2d 1144 (9th Cir. 1991), the Court dealt with the issue of an ex parte contact between the arbitrator and a representative of one of the parties. The Ninth Circuit first noted:

> As one would expect, no direct proof exists that Levin [party representative] talked to Sempliner [arbitrator] about the merits of the case.

952 F.2d at 1148. Notwithstanding the foregoing, the Court nevertheless held that:

> Even if Levin and Sempliner did not discuss the merits of the case, their ex parte contacts afforded Levin an opportunity

> to probe Sempliner's mood and general attitude and then to prejudice Sempliner.

952 F.2d at 1149.

There is an obvious conflict between the ex parte standard espoused by the Ninth Circuit (no need for direct evidence of discussion of merits) and that adopted[7] by the Third Circuit (direct evidence required that merits of litigation were discussed).

The preferable standard is that adopted by the Ninth Circuit. A ban on ex parte contacts should be just that. If this Court were to adopt the Ninth Circuit's standard, it would avoid the parties to the ex parte contact seeking to excuse their prohibited behaviour on the basis of self-serving affidavits and

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7 The parties briefed the Pacific & Artic Ry. case to the Third Circuit.

letters disclaiming discussions of the merits of the litigation. As the Ninth Circuit correctly noted, there is seldom direct proof of what was discussed in an ex parte meeting. The whole purpose of a ban on ex parte contacts is to avoid impropriety and the appearance of impropriety.

Since the existence of ex parte contacts is a continuing issue in the field of arbitration, it would be extremely helpful to the process if this Court were to adopt the Ninth Circuit's standard on ex parte contacts in labor arbitration.

Finally, if the federal judiciary signals to parties to labor arbitration that it will not enforce its own ban on ex parte contacts, the "law" of arbitration will return to the law of the jungle where anything goes, especially ex parte

communications, and the only "rule" will be which party can out-ex parte the other parties.

To protect the integrity of the arbitration process and the parties who agree to arbitration as the preferred method of resolving labor disputes this Court should adopt the standard of the Ninth Circuit and enforce agreements and orders against ex parte contacts.

Conclusion

Since this Court declared over thirty years ago that arbitration was the favored method of resolving labor disputes, and since strikes have largely lost their efficacy,[8] arbitration has increased as the alternative dispute

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8 See, e.g., Washington Post, 7/5/92, p. H1, article entitled, "Labor Loses the Strike as a Weapon."

resolution process. Now that arbitration has come of age and millions of workers and their employers are bound by its results, the time has come to settle two recurring problem areas.

The many cases cited in this brief amply demonstrate that the issue of the "binding" effect of prior arbitration awards on subsequent arbitrations has been a recurring problem over the past two decades and should be definitively addressed by this Court in order to terminate once and for all attempts to involve the federal judiciary in the merits of labor disputes by arguing that subsequent arbitrators should be "bound" by the results of prior arbitration awards.

Equally important to the arbitration process and to the millions of Americans who are bound by its results is the

preservation of basic fairness in the process by enforcement of court ordered bans on ex parte contacts. Since the Third and Ninth Circuits have different standards for enforcing the ban on ex parte contacts, this Court should resolve the conflict by adopting the Ninth Circuit standard that the ban should be enforced even if there is no direct proof that the ex parte contact involved the merits of the case. This will go a long way toward restoring confidence in the integrity of this increasingly used method of resolving labor disputes.

A petition for certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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Attorney for the Petitioner,
The Frontier Pilots Litigation Steering Committee, Inc.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PEOPLE EXPRESS PILOT MERGER COMMITTEE,	:	CIVIL ACTION NO. 87-1155
Plaintiff,	:	
v.	:	HON. NICHOLAS H. POLITAN
TEXAS AIR CORP., et al.,	:	
Defendants.	:	

ORDER COMPELLING ARBITRATION OF
THE INTEGRATION OF PILOT SENIORITY LISTS
OF CONTINENTAL AIRLINES,
PEOPLE EXPRESS AIRLINES
AND FRONTIER AIRLINES PURSUANT TO
THE PROVISIONS OF
THE LABOR PROTECTION AGREEMENT

I. Introduction

These procedures will govern the pilot seniority integration process for the pilot work forces of Continental Airlines ("Continental"), Peoples Express Airlines ("PEX") and Frontier Airlines ("FAL").

II. Seniority Integration Procedures

1. Section of Committees. Within 30 days of the date set forth below, the People Express Pilot Merger Committee shall select a seniority integration committee of five members and one alternate. The Continental Pilots Merger Committee shall similarly select a committee of five members and one alternate. The Frontier Pilots Litigation Steering Committee shall also select a committee of five members and one alternate. The alternates shall participate fully in all aspects of the process set forth below to enable a smooth and timely transition should a member become unable to continue serving.

The Frontier Pilots Litigation Steering Committee's participation in this arbitration shall be circumscribed by the Final Award of Arbitrator George

Nicolau, dated June 15, 1987. FAL may not assert a position inconsistent with that Arbitration Award but shall, for the purposes of this arbitration, be deemed bound by that award. The Award of Arbitrator Nicolau is currently under appeal. In the event, at any time prior to the Final Arbitrator's Award in this matter, the decision of Arbitrator Nicolau shall be reversed or modified, any party may make application to this Court, on short notice, to consider the impact of that determination upon this arbitration proceeding.

2. Exchange of Data. Within 60 days of the date set forth below, the committees together with Continental shall meet at a mutually agreeable place and time for the purpose of exchanging seniority data. No later than that date, Continental shall provide each committee

seniority lists of all pilots as of September 15, 1986, March 12, 1987 and June 1, 1989, which include date of birth and date of hire (that is, the date used by the Continental, FAL and PEX pilots for monthly and system bidding purposes) of former PEX, FAL and Continental pilots, including seniority lists with date of hire of pilots at each base, and base staffing lists showing each pilot's aircraft and status as of September 15, 1986, March 12, 1987, and June 1, 1989. By that date, Continental will also supply each committee with the W-2 earnings and common stock or other securities received as compensation for services for each pilot on any of the foregoing lists for the calendar years 1984, 1985, 1986, 1987 and 1988. By that date, Continental shall also supply each committee with the furlough and strike and leave of absence

dates for each pilot on any of the foregoing lists, together with his/her adjusted longevity date. By that date, Continental shall also furnish the committees with a list of each Continental pilot's status under the rulings regarding Continental of the U.S. Bankruptcy Court for the Southern District of Texas, including rulings on appeals therefrom, including whether he/she is an Option 1, Option 2 or Option 3 pilot, as well as any copies of any rulings of the Bankruptcy Court, and rulings on appeal therefrom, pertaining to him/her for seniority purposes. If any committee has any questions about the accuracy or completeness of the lists, Continental will promptly investigate and resolve them. The Committee and Continental shall meet to resolve any questions regarding pilot employment data within 90

days of the date set forth below. Any committee may file with the Court a motion on short notice if there remains disagreement regarding the adequacy of the information provided. For purposes of seniority list integration only, the neutral may resolve any employment data issues as to which all parties cannot agree. Continental is not required to produce any information not within its possession, custody or control.

3. Initial conferences. Within 100 days of the date set forth below, the committees shall attempt to reach agreement upon a fair and equitable integration of the seniority lists of the pilot groups. Barring agreement by majority vote of each committee within 130 days of the date set forth below, the parties shall attempt to reach agreement on a neutral third party who shall serve as a

binding arbitrator. If the parties fail to reach agreement, any committee may petition the national office of the American Arbitration Association ("AAA") to furnish a list of seven arbitrators who are members of the National Academy of Arbitrators experienced in airline labor relations to the committees. The committees shall select an arbitrator from said list by alternate striking (an equal number of strikes for each committee) within five (5) days of receipt from the AAA.

4. Hearing before Neutral. Within 160 days from the date set forth below or as soon as the neutral is available, the neutral shall preside over a hearing during which each pilot group and Continental may present evidence and argument in support of its proffered method of

integration. The hearing shall be conducted as expeditiously as possible with all due dispatch. There shall be no limit on the number of expert or other witnesses any party may call so long as they do not unduly burden the record. The parties shall have the opportunity to submit briefs following the hearing. The proceeding shall be transcribed by a certified court reporter, who shall supply the original to the neutral and a copy to each committee and Continental. The cost of the original transcript and copies shall be paid by Continental. The arbitration hearing will be held in Washington, D.C. or in another location(s) mutually acceptable to the committees and Continental.

5. Factors to be Considered by Neutral; Information for Conferences/ Hearings. The neutral shall consider any

factor relevant to a fair and equitable integration of the seniority lists of the People Express, Frontier and Continental pilots. The parties are free to urge the neutral to consider any factor, and put in evidence any support, that they believe is relevant to this standard. Upon request by any committee or the neutral, Continental will provide such information as is reasonably available to it, and is necessary to the process. However, except for the information identified in Paragraph II.2 above, Continental shall not be required to provide any information which is not a matter of public record; provided, however, that prior to the commencement of the arbitration, the neutral shall conduct a prehearing conference to resolve any outstanding procedural or evidentiary disputes, including any outstanding requests for information.

At this conference or during the hearing, the neutral may also rule on requests for information deemed confidential by Continental and motions by any party to have such information, if deemed confidential by the neutral, to be received under an appropriate protective order issued by the neutral and, if admitted into evidence, admitted under seal. Continental shall not provide information to one pilot group unless it provides the same information to all committees in the same form. The information identified in Paragraph 2 shall be treated confidentially.

6. Decision by Neutral. Within 45 days of the conclusion of the hearing, the neutral shall resole all open issues previously unresolved by the committees and Continental, and will simultaneously issue a written opinion explaining the

basis for his/her decision. The decision of the neutral shall be final and binding on the committees, their respective pilot groups, and Texas Air Corp., Continental Airlines, Inc., People Express, Inc., People Express Airlines, Inc., and Frontier Air Lines, Inc.

7. Conditions on Integrated List. The integrated pilot systems seniority list to be produced under these procedures shall be subject to the following condition: the integrated list shall not alter or vary Continental's employment policy.

8. Miscellaneous.

a. Fees and Expenses of Neutral. The party or parties who are to bear the fees and expenses of the neutral shall be determined by the Court after the arbitration.

b. Release from duty and expenses of Committee Members. Continental shall approve all releases from flight and other duty that are required by the respective committee members and alternates and witnesses in order that they may perform their duties hereunder. Said releases shall be approved for all meetings and arbitration hearings referred to hereinabove, as well as preparation related thereto. Continental shall pay all flight pay loss of the respective committee members and alternates resulting from participation in the seniority integration process up to a maximum of 85 hours of flight pay plus $250 per month per diem. Continental will provide the committee members and alternates with fee-waived PS-5 passes for travel required in connection with the seniority integration.

c. Communication with Neutral. Neither Continental nor the committees may communicate with the neutral, either formally or informally, outside the presence of the other parties, except in writing, with copies to the other parties, provided, however, that any party electing not to be present for a meeting or hearing date waives any right to be present for such communications.

d. Attendance at meetings and hearings and exchange of documents. Continental may send representatives to all meetings and arbitration sessions. In addition, Continental will be timely furnished with copies of all documents exchanged between the committees. In no event shall any final solution be reached which is not acceptable to each committee (by majority vote), unless such solution

is imposed by the Neutral provided for herein.

e. Financial Assistance. Continental shall not either directly or indirectly aid financially one pilot group unless it agrees and does provide the identical level of financial assistance to all pilot groups; the pilot seniority integration committees shall not either directly or indirectly receive any financial assistance from sources outside the company, including ALPA, and shall report to the Court any such funds received after April 24, 1989, provided, however that each committee may receive contributions from the pilots whom it is representing.

III. Retention of Jurisdiction.

The Court retains jurisdiction over this matter, and within 10 days of the

arbitrator's written decision, the parties shall submit it to this Court, and any party may apply to the Court at that time for affirmance, rejection, modification or such other action as it deems appropriate. At the same time, the parties shall submit to the Court the bill of the neutral for the Court to determine who shall bear the costs of the arbitration.

It is so ordered, at Newark, New Jersey, this 7th day of August, 1989.

Nicholas H. Politan
United States District Judge

UNITED STATES DISTRICT COURT
District of New Jersey

NOT FOR PUBLICATION

November 26, 1991

LETTER OPINION AND ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Re: Peoples Express Merger
Committee, etc. v. Texas Air
Corporation, et al
Civil Action No. 87-1155

Dear Counsel:

This matter comes before the court on plaintiff Peoples Express Pilot Merger Committees' ("PEX Pilots") motion to affirm and enforce the August 13, 1991 arbitration award issued by Arbitrator Jerome Ross. Defendant-Intervenor Frontier Pilots Merger Committee ("Frontier")

has cross-moved to reject the arbitration award. In response to the cross-motions filed by the PEX Pilots and the Frontier Pilots to affirm/reject the arbitration award, defendant Continental Airlines, Inc. ("Continental") takes the position that this court should affirm and enforce the arbitration award. In addition, the Continental Pilots Merger Committee has filed an application for an order directing Continental to bear all fees and expenses which have been billed by Arbitrator Jerome H. Ross in connection with the arbitration conducted pursuant to the

August 7, 1989 order.[1] I heard oral argument on November 18, 1991 and reserved decision. For the reasons outlined herein, the PEX Pilots' motion is **GRANTED** and the arbitration award is **AFFIRMED**.

In an Order dated August 7, 1989, I compelled arbitration of the integration of the Pilot Seniority Lists of People Express Airlines, Continental Airlines, and Frontier Airlines pursuant to the provisions of the Labor Protection Agreement (the "LPA"). The relevant provisions of the LPA provide as follows:

> [I]n the event of a future merger of airline operations involving any air carrier

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1 On October 2, 1991, the U.S. Bankruptcy Court for the District of Delaware issued an order lifting the automatic stay provision of 11 U.S.C. § 362 for purposes of permitting this court to act upon applications filed pursuant to ¶ 3 of the August 7, 1989 Order, including applications regarding responsibility for the Arbitrator's fees and expenses.

> subsidiary of People Express, Inc., provision shall be made for fair and equitable seniority integration procedures for affected employees in each craft or class, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator who shall be a member of the National Academy of Arbitrators.

Pursuant to my Order compelling arbitration, hearings commenced before Arbitrator Ross on May 7, 1990. Arbitrator Ross conducted 72 days of hearings and he reviewed extensive briefs and reply briefs submitted by the parties. The hearings were concluded and the record was closed with oral arguments on April 29, 1991. On August 13, 1991, Arbitrator Ross rendered a 135 page Opinion and Award integrating the Pilot Seniority List of People Express Airlines, Continental Airlines, and Frontier Airlines.

I retained jurisdiction over this action pursuant to ¶ 3 of my Order compelling arbitration as follows:

> 3. Retention of Jurisdiction
>
> The court retains jurisdiction over this matter, and within ten (10) days of the Arbitrator's written decision, the parties shall submit it to this court, and any party may apply to the court at that time for affirmance, rejection, modification or such other action as it deems appropriate. At the same time, the party shall submit to the court the bill of the neutral for the court to determine who shall bear the costs of the arbitration.

Pursuant to this provision, the PEX Pilot Merger Committee now moves to affirm and enforce Arbitrator Ross' Award.

The Frontier Pilots seek to reject the arbitration award based on 5 grounds. First, Frontier contends that Arbitrator Ross' Award discloses a manifest disregard of the Labor Protection Agreement

and the Order of this court enforcing that agreement. Specifically, Frontier submits that the Award is not the product of a fair and equitable seniority integration procedure which the LPA mandates.

Second, Frontier maintains that the Award must be rejected because of an ex-parte communication between the Arbitrator and the Chairman of the PEX Pilot Merger Committee which constituted a clear and direct violation of ¶ 2.8(c) of this court's Order compelling arbitration.

Third, Frontier argues that the continuation of the hearing through the technical support committee violated the provisions of ¶ 2.4 of my order which required a transcript of the proceedings by a certified court reporter, and that

such hearings denied the assistance of counsel to the parties.

Fourth, counsel for Frontier contends that Arbitrator Ross deprived the FAL pilots of counsel of their choice when he refused to adjourn certain hearing dates over the objection of FAL's counsel.

Fifth, Frontier submits that the restriction placed by this court on the FAL pilots' participation in the Ross arbitration was contrary to the decisions of the Supreme Court and the Third Circuit that District Courts should leave to arbitrators the issue of the effect of a prior arbitration award.

The standards governing the court's review of a labor arbitration award are well known and extremely narrow. A court must enforce any arbitration award that "draws its essence from the collective

bargaining agreement". United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960). This standard reflects the policy in the federal courts of elevating labor arbitrators to "an exalted status". Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1126 (3d Cir. 1969).

Consequently, in reviewing an award, the court must begin its analysis by recognizing that the parties bargained for the arbitrator's construction of the agreement. See Enterprise Wheel, 363 U.S. at 599. A court may not, therefore, overrule an arbitrator simply because it disagrees with the arbitrator's construction of the contract, see id., or because it believes its interpretation of the contract is better than that of the arbitrator. See W.R. Grace & Co. v. Local 759, International Union of the

United Rubber Workers, 461 U.S. 757, 764 (1983). The Supreme Court has held that as long as the arbitrator has arguably construed or applied the contract, the award must be enforced, regardless of the fact that a court is convinced that the arbitrator has committed a serious error. See United Paperworkers International Union v. Misco, 484 U.S. 29, 36 (1987).

The Third Circuit has elaborated upon this standard of review finding that, in order to upset an arbitrator's award, there "must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of an award." News America Publications v. Newark Typographical Union, 918 F.2d 21, 24 (3d Cir. 1990) citing, N F & M Corp. v. United Steelworkers of America, 524 F.2d 756, 760 (3d Cir. 1975)). Thus, only

where there is a "'manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.'" Id. at 759 (quoting, Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969)). In this regard, a court may not review the merits of the arbitral decision. See Misco, 484 U.S. at 36. A court does not review the award to ascertain whether the arbitrator has applied the correct principles of law. See Enterprise Wheel, 363 U.S. at 598. An arbitration award may not be overturned for factual error, see Misco, 484 U.S. at 38, or because the court disagrees with the arbitrator's assessment of the credibility of witnesses, or the weight the arbitrator has given to testimony. See N F & M Corp., 524 F.2d 759. The test for

reviewing an arbitration award is, therefore, "a singularly undemanding one." Newark Typographical, 918 F.2d at 24.

The court now turns to Frontier's first argument in opposition to the enforcement of the Arbitration Award, namely, that the award reflects a manifest disregard of the provisions of the Labor Protection Agreement. Pursuant to the provisions of the Labor Protection Agreement, Arbitrator Ross was bound to apply a "fair and equitable" standard in rendering the award which integrated the Pilot Seniority Lists of Continental Airlines, People Express Airlines, and Frontier Airlines. Frontier contends that Arbitrator Ross failed to balance the equities of all three pilot groups by his own admission when he stated:

> The critical differences between the arbitral charters of the [Job Preservation Agreement] and the LPA require my

> analysis to focus primarily on the relative equities of the [Continental Airlines] and PEX pilots.

(Arbitration Opinion at p. 117).

Frontier submits that, instead of weighing the comparative equities of all three pilot groups on a fair and equitable basis, Arbitrator Ross "tilted the playing field" by stating that the "primary" comparison would be between the Continental and PEX pilots. As such, Frontier maintains that Arbitrator Ross relegated the FAL pilots to a secondary role in this arbitration because of the Job Preservation Agreement and the Nicolau Award which I previously held would be binding on the FAL Committee for purposes of the Ross arbitration.

I find that Arbitrator Ross' award meets the "singularly undemanding" standard set forth by the Third Circuit Court

of Appeals in News America. The arbitration award simply does not reflect a "manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop . . . ." Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969). To the contrary, a thorough review of Arbitrator Ross' opinion and award reveals that there is much support in the record justifying his determinations. A review of the record below discloses that Arbitrator Ross weighed a myriad of considerations bearing on the construction of a fair and equitable merged seniority list, including but not limited to, the economic viability of the respective carriers, the non-operating status of FAL and the limited employment prospects for the FAL pilots resulting therefrom, together with the protection

afforded the CAL pilots by virtue of their promotional expectations for aircraft on firm order or option to CAL as of September 15, 1986. (See Ross Opinion and Award at pp. 116-121.) The parties to this action bargained for Arbitration Ross' construction of what is "fair and equitable" under the circumstances. I cannot overrule the Ross Award simply because FAL disagrees with Arbitrator Ross' construction of the contract, or because FAL believes its interpretation of the contract is better than that of the Arbitrator. See W.R. Grace & Co. v. Local 759, International Union of the United Rubber Workers, 461 U.S. 757, 764 (1983). See also United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Accordingly, Arbitrator Ross' Award must be affirmed.

The court now addresses Frontier's second argument, namely that the Arbitration Award must be rejected because of an ex parte communication between the Arbitrator and the Chairman of the PEX Pilot Merger Committee. Frontier essentially asks this court to upset an Arbitration Award which resulted from 72 days of hearings based on a half hour conversation between Arbitrator Ross and Captain Mac Kenzie, the PEX Committee Chairman. The only sworn testimony that the court has before it concerning what occurred during this half hour conversation is the affidavit of Captain Mac Kenzie and Arbitrator Ross' letter, which both attest to the fact that the conversation related to the continued participation of

the People Express Committee in the Subcommittee meetings.[2]

There is absolutely no evidence before this court to indicate that the conversation between Captain Mac Kenzie and Arbitrator Ross related to the substance of what transpired at the Technical Advice Committee meetings. It is important to note that the arbitration hearings were concluded and the record was closed with oral arguments on April 29, 1991, while the conversation between Arbitrator Ross and Captain Mac Kenzie

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2 In a letter dated August 13, 1991, Arbitrator Ross indicated that his discussion with Jim Mac Kenzie "was limited to requesting that the People Express Committee continue participation in the SubCommittee meetings in the interest of promoting insight into the construction of the list, which in turn would lead to harmony among the pilot groups." Arbitrator Ross further indicated that at no time did he "discuss the People Express Captain ratio in relation to the Frontier Pilots."

occurred on July 12, 1991. The conversation between Ross and Mac Kenzie took place during a break in the Technical Committee sessions, shortly after the People Express representatives on the Technical Committee distributed a letter declining to participate further in the Technical Committee meetings. Moreover, this conversation was in full and open view of the other parties' representatives. After 72 days of full and fair hearings conducted by Arbitrator Ross and the submission of some 17,000 pages of documents, it is baseless for Frontier to suggest that the Arbitration Award should be overturned because of this half hour conversation between Captain Mac Kenzie and Arbitrator Ross. The brief and limited discussion between Captain Mac Kenzie and Arbitrator Ross clearly did not prejudice the Frontier Pilots so as

to deprive them of "a fundamentally fair hearing". See National Post Office Mailhandlers v. U.S. Postal Service, 751 F.2d 834, 841 (6th Cir. 1985).

Frontier's third argument, that the arbitration award should be vacated based on the continuation of the hearings through the Technical Support Committee, must be rejected outright. Frontier argues that the continuation of support hearings violated the provisions of ¶ 2.4 of this court's Order Compelling Arbitration. ¶ 2.4 of my arbitration order provides as follows:

> The proceedings shall be transcribed by a certified court reporter, who shall supply the original to the neutral and a copy to each committee and Continental.

An issue apparently arose on March 2, 1991 concerning how Arbitrator Ross would handle the proceedings after he had

studied the briefs and decided the matter. One of the parties suggested that, after arriving at a tentative decision, Arbitrator Ross should convene the parties to announce his proposed decision and to solicit the views of the parties and their respective counsel concerning his tentative award before it became final. Counsel for the FAL pilots opposed this suggestion and, instead, urged Arbitrator Ross to form a committee of his choosing of the group of pilots "to flesh out any computer runs [he] would like to have done . . . after the award." (See transcript of arbitration proceedings at p. 16,689).

The idea of "a technical support committee" arose from this debate. Arbitrator Ross voiced his desire for a committee of pilots ("other than counsel") "to look at a list that [he] put

together and to assist [him] in the technical aspects of drafting that list so that what finally comes out makes clear what it is that [he] want[s] done." Arbitrator Ross then emphasized that this process would take place after he had made his basic decision. (See transcript of arbitration proceedings at pp. 16,704-705). Counsel for the PEX pilots agreed to participate in a technical support committee but advised against "a tentative award program" with Arbitrator Ross announcing a proposed decision and soliciting views from the parties as to that decision. (See transcript of arbitration proceedings at p. 16,706).

In an effort to explain his intentions concerning the formation of a technical support committee, Arbitrator Ross clarified his position as follows:

> I [am not] proposing any tentative award. What I [am] proposing [is] me meeting with some technical people not for the purpose of arguing anything but simply for the purpose of translating into words what it is that I see as my decision .... I am not talking about giving anybody a chance to change it [the decision] after we get involved in a committee action after that.

(See transcript of arbitration proceedings at pp. 16,707-16, 718).

Arbitrator Ross further stated that the "tentative award/pilot advisory committee" concept was "such a significant deviation from what was contemplated by [this court's] order that the only way that [he] would feel comfortable doing it would be if [there was] unanimous agreement that it made some sense." (See transcript of arbitration proceedings at pp. 90-95). Frontier contends that, despite the statements of Arbitrator Ross, the "technical support committee"

turned into a "de facto pilot advisory board" and the entire process was transformed de facto into a tentative award process. I disagree.

Arbitrator Ross' utilization of a technical committee consisting of pilots representing each of the four parties in no way denied the Frontier pilots a fundamentally fair hearing. I note at the outset that Frontier did participate in the technical support committee meetings. In fact, all of the parties participated in the technical committee's post-hearing business, without objection, until the PEX participants forwarded a letter to Arbitrator Ross on July 12, 1991, announcing their withdrawal from the process. It was not until after the delivery of the PEX letter that the Frontier pilots first voiced an objection to the technical committee process. On

August 12, 1991, Frontier complained about the continuance of the technical support committee meetings, as well as the ex parte contact in a letter to Arbitrator Ross. Nonetheless, Frontier continued to participate in the technical support committee meetings up through and including the final stages.

As previously stated, Frontier argued that the continuation of support hearings violated the provisions of ¶ 2.4 of this court's Order Compelling Arbitration. However, Frontier did not come before this court at such time to assert that this action violated my previous order. At oral argument, Mr. McGuinn, counsel for Frontier, suggested that he was reluctant to seek relief from this court at that time because he thought his efforts would prove unsuccessful. This argument is without merit. Moreover,

counsel for Frontier should refrain from forecasting what this court would decide as to any particular issue not yet before it and should do what he or she is supposed to do to protect his or her client.

Furthermore, Arbitrator Ross' utilization of the technical committee process proved to be both essential and efficient. For example, Arbitrator Ross used the technical committee process to resolve the truly technical matters which had arisen during the post-hearing proceedings, such as the question of how to deal with the 29 pilots who appeared on both the Continental and People Express Pilot Seniority Lists, but who returned to Continental prior to March 12, 1987, when Continental imposed its merged list. In the few technical sessions which occurred during the July 13-15 and August

7-9 periods, the technical support committee assisted the Arbitrator in addressing this and other matters and helped devise the conditions and restrictions which became a part of the award. As the Frontier pilots themselves concede, counsel representing all four parties met with the Arbitrator on August 9, 1991 in an effort to discuss the legal implications of the Frontier pilots' proposed pay protection and longevity credit conditions. (See Affidavit of John A. McGuinn, counsel for Frontier, dated August 21, 1991, at p. 3).

Frontier contends that Arbitrator Ross arrived at the first meeting of the "technical support committee" with a tentative award that would have started the PEX captain ratio with the top New York air captain, Charlie Bare, and would have matched the top 162 PEX downgraded

captains in a 1-for-1 ratio with the CAL pilots just junior to the most junior FAL captain. Frontier submits that, in the end, Arbitrator Ross changed his final award from his initial tentative award on June 14, 1991 in significant ways at different times during the technical committee process. Frontier argues that, instead of starting the first PEX captain at the first New York air captain, Charlie Bare, Ross dropped the start of the PEX captain ratio with CAL captains several hundred numbers below Captain Bare, and instead of ratioing the downgraded 162 PEX pilots on a 1-for-1 basis with the CAL pilots just below the junior FAL captains, Ross "arbitrarily" selected a point about 150 numbers junior to the CAL pilot immediately junior to the most junior FAL captain to start his ratio of

PEX downgraded captains and first officers with the CAL first officers. (See Frontier's brief in support of its motion to reject the arbitration award at p. 29).

It is significant to note that the Arbitrator's modifications of his initially announced also adversely affected the senior 295 People Express captains, who dropped "several hundred numbers below Captain Bare" (the number 1 New York air pilot), but all 295 of these People Express captains started out and ended up senior to all Frontier pilots. Clearly, the Arbitrator's change of position on this point during the technical committee phase had no impact whatsoever on any of the Frontier pilots. In addition, the parties could have not expected Arbitrator Ross to single-handedly manage the actual construction of a

merged seniority list containing more than 4,000 pilots from four different airlines. The technical support which Arbitrator Ross sought from the parties and their computers was both appropriate and necessary under the circumstances. The parties willingly agreed to provide such support and Frontier's eleventh hour objections are meritless. Accordingly, the continuation of the hearing through the technical support committee does not suffice as a reason for me to set aside Arbitrator Ross' award.

The court now turns to Frontier's fourth argument, namely, that Arbitrator Ross deprived the FAL pilots of counsel of their choice when he refused to adjourn a portion of the hearings. On September 21, 1990, counsel for the FAL pilots requested this court to order Arbitrator Ross to cancel certain hearing

dates when counsel for the FAL pilots could not be available. Specifically, counsel for FAL requested this court to postpone the arbitration hearings until May 1, 1991. I refused to intervene in an ongoing arbitration process and declined to grant the interlocutory relief requested at that time by an Order dated October 4, 1990. Although I have already ruled against the Frontier pilots on this point, I must emphasize that Arbitrator Ross permitted counsel for the Frontier pilots to cross-examine any and all witnesses he desired who had testified during his absence. Moreover, there is no merit in the Frontier pilot's argument that adding hearing days after May 1, 1991, as they requested, "would have prejudiced no one". The parties consumed

several months in briefing and arguing the case after the hearings were concluded. If the conclusion of the evidentiary hearings was delayed until May, then the issuance of the Award would have been delayed for several months. This result would run contrary to the proposition that arbitration proceedings provide for a prompt and efficient resolution of disputes. Accordingly, I will not overturn the Arbitration Award on the basis of this argument.

I now turn to Frontier's fifth argument, namely, that the restriction placed by this court on the FAL pilots' participation in the Ross Arbitration was contrary to Supreme Court precedent and Third Circuit decisions that District Courts should leave to arbitrators the issue of the effect of a prior arbitration. Over the objection of the FAL

pilots, I entered an Order, dated August 7, 1989, compelling arbitration which contained the following limitation on the FAL pilots:

> The Frontier Pilots Litigation Steering Committee's participation in this arbitration shall be circumscribed by the Final Award of Arbitrator George Nicolau, dated June 15, 1987. FAL may not assert a position inconsistent with that Arbitration Award but shall, for the purposes of this arbitration, be deemed bound by that award. The Award of Arbitrator Nicolau is currently under appeal. In the event, at any time prior to the Final Arbitrator's Award in this matter, the decision of Arbitrator Nicolau shall be reversed or modified, any party may make application to this court, on short notice, to consider the impact of that determination upon this arbitration proceeding.

At this point, I note that the Nicolau Award which integrated the FAL pilots with the Continental pilots was ultimately affirmed by the Colorado Supreme Court.

This argument for the rejection of the Ross Award is essentially a repetition of the argument made before this court by the FAL pilots on May 11, 1989. Frontier relies on Local 103, IUE v. RCA Corp., 516 F.2d 1336 (3d Cir. 1975) as the leading case in support of its position that this court improperly restricted the role of the FAL pilots in the Ross arbitration proceedings. In Local 103, a grievance challenging the company's right to institute new job classifications was premised upon a 1946 arbitration decision which required the company to first establish a job description. The union sought to enjoin the arbitration and specifically the company's right to contest the underlying merits. The Third Circuit addressed the issue of finality in arbitration awards with the following language:

> The union evidences the fear that prior decisions will be litigated ad infinitum presaging a demise in finality and opening the door to abuse. We disagree. Open to the union, before the arbitrator, is the same contention it has presented to the courts, i.e., that the 'same question or issue' was previously 'the subject of arbitration'. So viewed, finality, consistent with the provisions of the agreement, will be preserved.

516 F.2d at 1341.

Subsequently, in Westinghouse Broadcasting Co., Inc. v. Local 804, 616 F.2d 97, 100, the Third Circuit stated, "we did decide in Local 103 [v. RCA] that it is for the arbitrator, and not the court, to decide whether the question or issue presented before an arbitrator in 1971 had previously been submitted before another arbitrator in 1946." The above Third Circuit cases relied upon by Frontier are clearly distinguishable from this case. The question or issue before

Arbitrator Ross was clearly not the same question or issue which was the subject of the Nicolau arbitration. The issue before Arbitrator Nicolau was the integration of the FAL pilot seniority list with the Continental pilot list after the merger. The issue before Arbitrator Ross was the integration of the PEX pilots with the list of Continental and FAL pilots comprised by Arbitrator Nicolau.

In my view, to the extent that Arbitrator Nicolau integrated the FAL pilots with the Continental pilots, the FAL and the Continental pilots became one body. Essentially, they had the same interests to protect. They each had a position on a pilot seniority list which they had attained as a result of the Nicolau Arbitration Award. I refused to allow the FAL pilots to argue for a change of their position on the seniority

list vis-a-vis the Continental pilots in the arbitration proceedings before Arbitrator Ross. If I permitted such conduct, then I would be encouraging a collateral attack on the award issued by Arbitrator Nicolau before the Colorado Supreme Court could issue a final determination on that award.

However, I permitted the FAL pilots to participate in the Ross arbitration in an effort to allow them to protect whatever position they had attained as a result of the Nicolau Award vis-a-vis the People Express pilots who were to be integrated by virtue of Arbitrator Ross' Award. Moreover, my order dated August 7, 1989, provided that any party may make application to this court, on short notice, to consider the impact, if any, of a reversal or modification of the

Nicolau Award issued prior to the completion of the Ross arbitration proceedings. Since the Colorado Supreme Court has already affirmed the Nicolau Award, I refuse to change my position and collaterally overrule the Nicolau Award. Accordingly, I will not overturn the Ross Award on the basis of this argument.

Counsel for FAL advanced two additional arguments for the rejection of the Ross Arbitration Award at oral argument. First, the FAL pilots suggested that because they did not participate in the interim fee arrangement, Arbitrator Ross decided not to treat the FAL pilots fairly and equitably and that he became biased as to their position. This argument is clearly without merit. My Order Compelling Arbitration, dated August 7, 1989, made no provision for payment of the fees and expenses of the arbitrator

on an interim basis. However, pursuant to ¶ 3 of that Order, I provided that:

> [W]ithin 10 days of the arbitrator's written decision, ... the parties shall submit to the Court the bill of the neutral for the Court to determine who shall bear the costs of the arbitration.

Since I could impose the costs of arbitration on any one party or on all parties equally, I find it extremely difficult to believe that Arbitrator Ross would be partial or biased against FAL because it did not contribute to his interim fees. For FAL to suggest that Arbitrator Ross would link their destiny to the fact that they did not contribute to his interim fee structure is ridiculous and completely without merit.

Secondly, FAL seizes upon one comment made by Arbitrator Ross during the course of over 72 days of hearings and Support Committee meetings in an effort

to overturn the Opinion and Award. Specifically, FAL contends that Arbitrator Ross stated that "the FAL pilots would have been better off if they had stayed home". FAL apparently asks this court to focus on one off-handed comment made during the course of 72 days of heated and vigorously contested arbitration hearings to conclude that Arbitrator Ross was partial and biased in his findings. I refuse to accept this contention. The record speaks for itself and indicates that Arbitrator Ross rendered a fair and impartial decision. Accordingly, the Award must be **AFFIRMED**.

THE ARBITRATOR'S FEES AND EXPENSES

As previously stated, pursuant to ¶ 3 of my Order Compelling Arbitration, dated August 7, 1989, I reserved the right to determine which parties would

bear the costs of arbitration. Continental initially volunteered to bear all costs of arbitration. At such time, counsel for the PEX pilots indicated that such an arrangement would lead to the appearance of impropriety. In an effort to preserve the integrity of the arbitration process and to maintain the appearance of impartiality, I declined to impose all costs on Continental.

I note that the relevant provisions of the Labor Protection Agreement concerning mergers provides as follows:

> In the event of a future merger of airline operations involving any air carrier subsidiary of People Express, Inc., provision shall be made for fair and equitable seniority integration procedures, for affected employees in each craft or class, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator who shall be a member of the National Academy of Arbitrators.

Now that the arbitration proceedings have been concluded and a fair and just Award has been rendered, I find that the fees for arbitration should be borne by Continental as part of the costs of the merger.

Accordingly, Continental will be responsible for Arbitrator Ross' fees and expenses in connection with the arbitration as well as reimbursement of all interim fees and costs which have been expended to date by PEX or FAL.

APPLICATION FOR A STAY PENDING APPEAL

On November 25, 1991, FAL submitted an application, on short notice, for a stay pending appeal. If I were to grant a stay pending appeal from my Order Compelling Arbitration, it "would fly in the face of the strong federal policy in favor of arbitrating disputes in general

and labor disputes in particular." See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). "Arbitration is supposed to be swift." See Graphic Communications Union v. Chicago Tribune Co., 779 F.2d 13, 15 (7th Cir. 1985). These observations are equally applicable here. Accordingly, FAL's application for a stay pending appeal is hereby **DENIED**.

SO ORDERED:

NICHOLAS H. POLITAN

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5975

PEOPLE EXPRESS PILOT MERGER COMMITTEE

v.

TEXAS AIR CORP.; CONTINENTAL AIRLINES, INC.; PEOPLE EXPRESS, INC.; PEOPLE EXPRESS AIRLINES, INC.;

and

FRANK T. SHANLEY; DAVID ROSS; H. F. MARONEY; A. G. SINIBALDI; GARY ARMENTROUT; BILL AUTREY; ANDY CASHETTA; H. A. COOPER; STAN CHALLGREN; BRIAN CRAVEN; JOHN GAYLORD; DON GENTRY; JOHN GIACCHI; DAVID HEEKEN; CHARLIE HIGDON; CHARLIE HUFF, DARRELL JOHNSTON; ALAN KING; NEIL MILLER; JIM NORTHINGTON; STEVE OLSEN; LARRY GREEN; JACK STICE; JIM SKELTON; JOHN CAMPBELL; KEN R. QUICK; R. S. BROADWATER; C. A. SCHEPACARTER; C. P. CONRADY; JOHN F. PAINTER; TOM E. STEVENS, as representatives of a class consisting of all Continental pilots;

FRONTIER PILOTS LITIGATION STEERING COMMITTEE

(Intervenor-Defendant)

NEIL A. MILLER

(Intervenor)

Frontier Pilots Litigation Steering Committee,

Appellant

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 87-1155)
District Judge: Honorable Nicholas H. Politan

Argued February 10, 1992

BEFORE: GREENBERG and COWEN, Circuit Judges, and GREEN, District Judge*

* Honorable Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT

_____
Circuit Judge

ATTEST:

_____
Sally Mrvos, Clerk

DATED: February 13, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5975

PEOPLE EXPRESS PILOT MERGER COMMITTEE

v.

TEXAS AIR CORP.; CONTINENTAL AIRLINES INC.; PEOPLE EXPRESS INC.; PEOPLE EXPRESS AIRLINES, INC.;

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NEIL A. MILLER

(Intervenor)

Frontier Pilots Litigation Steering Committee,

Appellant

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 87-1155)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, Circuit Judges, and GREEN, District Judge*

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and the court having ordered the appellees to file an answer to the petition and the court having considered the

petition and the answer and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____
Circuit Judge

DATED: April 10, 1992

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*Honorable Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Supreme Court, U.S.
FILED
AUG 10 1992
OFFICE OF THE CLERK

No. 92-63

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

Frontier Pilots Litigation Steering, Committee, Inc.,

Petitioner,

v.

Continental Airlines, Inc., Continental Pilots Merger Committee, and People Express Pilot Merger Committee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT PEOPLE EXPRESS PILOT MERGER COMMITTEE IN OPPOSITION

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August 10, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals and the District Court properly upheld the finality provision of the JPA arbitration agreement, which led to the Nicolau Award, by limiting the Frontier Pilots to but one arbitration to merge the Frontier and Continental Pilots' Seniority Lists?

2. Whether the Court of Appeals properly held that the District Court acted within its discretion in rejecting the Frontier Pilots' contention that affirmance of the Ross Award was barred on account of the Arbitrator's brief, conspicuous, non-substantive conversation with Capt. Jim Mackenzie on July 12, 1991?

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No. 92-63

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

Frontier Pilots Litigation Steering,
Committee, Inc.,

Petitioner,

v.

Continental Airlines, Inc.,
Continental Pilots Merger Committee, and
People Express Pilot Merger Committee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT PEOPLE EXPRESS PILOT MERGER COMMITTEE IN OPPOSITION

OPINIONS BELOW

The Order of the District Court for the District of New Jersey Compelling Arbitration, entered August 7, 1989, is not published, but is reprinted in the Appendix to the Petition at pages 1a-15a.

The Opinion and Order of the District Court for the District of New Jersey entered November 26, 1991, affirming an arbitration award, is not published, but is reprinted in the Appendix to the Petition at pages 16a-57a.

The Judgment Order of the Court of Appeals affirming the District Court's decision, entered February 13, 1992, is not officially reported, but is reprinted in the Appendix to the Petition at pages 58a-60a.

The Order of the Court of Appeals denying rehearing and rehearing in banc, entered April 10, 1992, is also not reported officially, but is reprinted in the Appendix to the Petition at pages 61a-63a.

JURISDICTION

Following the Judgment Order of the Court of Appeals on February 13, 1992, Petitioners filed a motion for rehearing or rehearing in banc which was denied on April 10, 1992. The Petition was filed on

July 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant statute is a section of the Railway Labor Act, 45 U.S.C. § 153(p), which establishes the grounds for vacating arbitration awards in the railroad and airline industries. That section provides in part:

> [T]he district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment . . . as may be appropriate to enforce or set aside the order . . . : Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

STATEMENT

I. THE CORPORATE MERGER AGREEMENT

During the summer of 1986, People Express, Inc. ("PEI") was an airline holding company; its two largest wholly-owned subsidiaries were People Express Airlines,

Inc. ("PEX") and Frontier Airlines, Inc. ("FAL"). App. 246-247. In August 1986 FAL ceased operating and filed for protection from its creditors under Chapter 11 of the Bankruptcy Code. App. 177.[1] On September 15, 1986, PEI entered into a Merger Agreement with Texas Air Corporation ("TAC"), another airline holding company, the largest of whose subsidiaries was Continental Airlines, Inc. ("CAL"). App. 17-77.

On September 19, 1986, as then required by the Federal Aviation Act, 49 U.S.C. §§ 1301, *et seq.*, TAC and PEI filed a joint application seeking approval from the U.S. Department of Transportation ("DOT") for their proposed merger. App. 78-92. In the joint application, the companies described two separate agreements relating to seniority integration which were a part of their transaction.

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[1] "App." references are to the Joint Appendix prepared and submitted to the Court below.

II. THE JPA AND THE NICOLAU AWARD

The first was the Frontier-Continental Job Preservation Agreement (the "JPA"). App. 99-131. The JPA contemplated CAL's acquisition of certain FAL assets and employees, but was contingent upon the execution of specified waivers and agreements by the FAL pilots and their collective bargaining representative, the Air Line Pilots Association, International ("ALPA"). App. 34, 39. These agreements included an arbitration for the consolidation of the FAL and CAL pilot seniority lists, but mandated the arbitrator to "take special notice of the non-operating status of Frontier Airlines immediately prior to the date of this Agreement and the limited employment prospects for Frontier employees resulting therefrom." App. 117-18.

The Frontier Pilots approved the JPA by unanimous vote at a union meeting on October 2, 1986, ALPA executed it on October 6, 1986, and the required percentage of FAL pilot waivers were sent to

CAL by October 15, 1986. App. 440, 445. TAC acquired FAL's assets during October and November, 1986.

On January 7, 1987, the FAL and CAL pilot representatives entered into a seniority integration procedures document which reaffirmed the JPA's basic precepts, including the fact that the arbitrator's decision was to be "final." App. 303-05. George Nicolau conducted an arbitration pursuant to these agreements, and he rendered his Opinion and Award on June 15, 1987. App. 171-222 ("the Nicolau Award"). He placed a block of 162 FAL senior captains in the CAL list beginning at number 1675. App. 214, 220.

The FAL pilots were displeased with the Nicolau Award because they felt that the JPA had restricted Arbitrator Nicolau to considering certain negative factors (such as limited employment prospects and promotional expectations) arising out of FAL's non-operating status immediately prior to its acquisition by CAL. The FAL pilots attacked the validity of the

Nicolau Award in the Colorado courts, but to no avail. App. 323, 487, 822.

III. THE LPA AND THE ROSS AWARD

In their joint application to the DOT, TAC and PEI also urged the DOT not to impose labor protective provisions ("LPPs") as a condition of its approval of the merger because TAC and PEI had already entered into a Labor Protection Agreement ("LPA") to facilitate a smooth labor transition. In support of their claim that the DOT need not impose other restrictions, TAC and PEI attached a copy of the LPA, which required that:

> Provision shall be made for fair and equitable seniority integration procedures, for affected employees in each craft or class, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a neutral mediator who shall be a member of the National Academy of Arbitrators. App. 15-16.

DOT tentatively approved TAC-PEI's joint application for merger, and made specific reference to the companies' assurances concerning their provisions

for seniority integration. DOT Show Cause Order, Docket 44365, dated October 15, 1986, p. 2. DOT issued its Final Order approving the merger on October 24, 1986. App. 164-70. That order denied LPPs and left Texas Air and People Express free to pursue seniority integration in accordance with the LPA.

Following an affirmative vote of PEI shareholders on December 29, 1986, the transaction was consummated the next day. App. 615. When CAL unilaterally merged the People Express pilots into the CAL/FAL pilots' seniority list without the agreement or arbitration as prescribed in the LPA, the People Express Pilot Merger Committee ("the PEX Pilots") brought suit against CAL, seeking compliance with the LPA. App. 615.

The District Court compelled an arbitration to combine the PEX and CAL/FAL pilot seniority lists under the terms of the LPA on August 7, 1989. App. 473-81. Recognizing that the Arbitrator would pay

close attention to the Order Compelling Arbitration,[2] the District Court consciously refrained from focusing the Arbitrator's attention on any particular consideration and allowed the parties, during arbitration, to argue any factor they thought relevant to the seniority integration. App. 968-69, 471-72.

The District Court further determined that the former Frontier Pilots had a right to participate in the arbitration over the People Express pilots' integration into the combined Continental-Frontier seniority list. The Frontier Pilots admitted in the District Court in seeking to intervene that "the seniority rights of the Frontier pilots at Continental were already decided in a prior arbitration proceeding," and that "[w]e acknowledge the Nicolau Award, . . . and we recognize that it is final and binding absent it being set aside." App. 340, 366. They nonetheless argued for the right

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[2] "I think the point is well taken that the arbitrator is going to carefully read the submission that I give him. He's going to feel bound to follow what the submission is, as all arbitrators are." App. 472.

to intervene "in order to prevent any encroachment on the seniority rights . . . currently held by the Frontier pilots." App. 334. The Frontier pilots' need for separate representation from the other pilots on the combined Frontier-Continental seniority list arose out of the possible impact of Arbitrator Ross inserting hundreds of People Express pilots into the combined Frontier-Continental list constructed by Arbitrator Nicolau marginally senior to the Frontier pilots. App. 366. The solid block of positions on the Continental seniority list Arbitrator Nicolau had given to them and the recency of their addition to the list rendered the FAL pilots particularly vulnerable, as a group, to Arbitrator Ross's interposition of People Express pilots just ahead of them. App. 740, 791. However, the District Court cautioned that the FAL Pilots' participation in the PEX arbitration was only "to prevent a possible change in their existing seniority status," and did not amount to an additional opportunity for the FAL pilots to litigate their

previously-defined positions on the existing CAL/FAL seniority list, as constructed by Arbitrator Nicolau. App. 370, 376-77.

In accordance with the District Court's Order, the FAL pilots, the PEX pilots, the CAL pilots and CAL proceeded through seventy-two (72) days of arbitration hearings over the issue of how to integrate the PEX pilots into the CAL/FAL seniority list. App. 618. Jerome H. Ross decided the lengthy, hard-fought arbitration, which took nearly a year to complete and generated 16,725 pages of transcript, approximately 1,000 exhibits and more than 1,000 pages of post-hearing briefs. App. 744.

IV. THE PARTIES' POST-HEARING TECHNICAL SUPPORT COMMITTEE AND ARBITRATOR ROSS'S BRIEF, CONSPICUOUS, NON-SUBSTANTIVE CONVERSATION WITH CAPT. JIM MACKENZIE ON JULY 12, 1991

After the close of the evidentiary hearings before Arbitrator Ross, and after the submission of briefs and closing argument, all four parties consented to participate in meetings of a joint Technical Support

Committee. That committee, composed of pilots only, provided the Arbitrator computer and other technical assistance in finalizing the proper order of the more than 4,000 names on the combined pilot seniority list. App. 607-11. The Technical Support Committee met on June 14 and 27 and July 11, 1991.

No one objected to the joint committee's sessions until July 12, 1991, when the People Express representatives distributed a letter withdrawing the PEX pilots from further participation in the Technical Support Committee. App. 796-97. Later that day, at Arbitrator Ross's request, Arbitrator Ross met with the PEX pilot chairman, Capt. Mackenzie, for 15-30 minutes.[3] App. 748. They met in the hotel lobby at first, and continued their conversation in the same meeting room in the hotel in which the Arbitrator had been meeting with the Technical Support Committee. *Id.*

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[3] Capt. Mackenzie, unlike the other Merger Committee Chairmen, did not serve on the Technical Support Committee.

Both Arbitrator Ross and Capt. Mackenzie have stated[4] that during their conversation they discussed only the letter in which the People Express representatives had withdrawn from the Technical Support Committee process. App. 748-49. The letter had just been distributed to the Arbitrator and the other parties during a meeting of the Technical Support Committee. Arbitrator Ross explained to Capt. Mackenzie that he found the Technical Support Committee sessions "invaluable." *Id.* Capt. Mackenzie reiterated what his colleagues had said in their letter. App. 748. Specifically, he told Arbitrator Ross that "the other parties had turned the Technical [Support] Committee sessions into an extension of the litigation process, rather than a forum for resolving purely

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[4] The Frontier Pilots sought no discovery in the district court regarding the July 12 events. Nor did they ever ask that the district court conduct an evidentiary hearing regarding these events. App. 846-47.

technical questions, and that it was unfair to the People Express pilots to continue them." *Id.*

Capt. Mackenzie's sworn Declaration made it clear (at paragraph 6) that the conversation was confined to the subject of the continued participation of the People Express representatives in the Technical Support Committee sessions:

> At no time during our meeting did I argue or suggest that the Arbitrator should merge the pilot seniority lists, or any segment of the lists, in any particular fashion. No agreements were offered or made. I told the Arbitrator I would discuss the subject further with my entire committee, which I did that afternoon and evening. App. 749.

For his part, in denying the FAL Pilots' August 12, 1991 request that he recuse himself, Arbitrator Ross placed this conspicuous, non-substantive conversation into perspective as follows:

> My discussion with Jim MacKenzie was limited to requesting that the People Express committee continue participation in the subcommittee meetings in the interest of promoting insight into the construction of the list, which in turn would lead to harmony among the pilot groups. At no time did we discuss the People Express captain ratio in relation

> to the Frontier pilots. Nor did he attempt to influence me with regard to the construction of any other part of the list. App. 750-51.

Arbitrator Ross also noted in his letter of August 13, 1991, in which he refused to recuse himself, that he had told the Technical Subcommittee representatives who were in the hotel lobby that he "intended to discuss the People Express Committee's continued participation" with Capt. Mackenzie, and that he assumed all of the parties knew about it prior to his meeting with Capt. Mackenzie. App. 750. The Frontier Pilots concede that they were aware of the contested conversation while it was occurring on July 12, and that no one sought to join it or to monitor what was being said. App. 753, 782.

On July 14, the Frontier representatives sent a letter formally objecting to the Technical Support Committee sessions on the same grounds as the People Express representatives. App. 808. However, in the last paragraph of the Frontier Pilots' letter to the Arbitrator, they expressly consented to continue

participating in the Technical Support Committee meetings by telling the Arbitrator, "[O]ur technical committee shall remain at your service for as long as you deem necessary." *Id.*

The Frontier Pilots' representatives did in fact participate in the three subsequent sessions of the joint Technical Support Committee, which were held on July 15 and August 7 and 8, 1991. Ross Decision, at 7 (App. 618). The Arbitrator met with counsel for all four parties on August 9 to discuss the language of the conditions and restrictions in the Award, and on August 13, the Arbitrator issued the Opinion and Award, together with a letter to counsel for the Frontier Pilots denying his motion of the previous day requesting the Arbitrator to recuse himself. App. 746, 750-51.

Arbitrator Ross's Opinion and Award summarized and analyzed the contentions of all four of the parties. App. 652-744. Rejecting the Frontier Pilots' contentions, Arbitrator Ross placed

approximately 295 PEX senior captains ahead of the block of 162 FAL senior captains which the Nicolau Award had created. App. 744.

V. THE DISTRICT COURT'S DECISION

The Letter Opinion of the District Court undermines the Frontier Pilots' contention that Arbitrator Ross and Capt. Mackenzie violated the District Court's specific prohibition against *ex parte* communications by their conversation on July 12, 1991. That ban is by its terms inapplicable for "any party electing not to be present for a meeting . . .,"[5] and the District Court found that "this conversation was in full

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[5] Section II.8.c. of the Order Compelling Arbitration provided:

> Neither Continental nor the committees may communicate with the neutral, either formally or informally, outside the presence of the other parties, except in writing, with copies to the other parties, provided, however, that any party electing not to be present for a meeting or hearing date waives any right to be present for such communications. Petition, at 13a.

and open view of the other parties' representatives." Petition, at 33a.

Furthermore, as the District Court also found, the Frontier Pilots offered "absolutely no evidence . . . that the conversation between Captain MacKenzie (*sic*) and Arbitrator Ross related to the substance of what transpired at the Technical Advice Committee meetings." Petition, at 32a. Thus, in the absence of any request by the Frontier Pilots for discovery or an evidentiary hearing regarding the July 12 events, the District Court accepted the explanations of Arbitrator Ross and Capt. Mackenzie as to the non-substantive content of their brief conversation. Petition, at 31a-32a and n.2.

Finally, in light of the extensive hearings Arbitrator Ross conducted, the District Court upheld the results of the arbitration as deriving from a process consistent with this Court's decisions in the *Steelworkers* trilogy and *United Paperworkers Int'l*

Union v. Misco, 484 U.S. 29, 36 (1987). Petition, at 23a-25a and 33a-34a. The District Court explained:

> [I]t is baseless for Frontier to suggest that the Arbitration Award should be overturned because of this half hour conversation . . . . The brief and limited discussion between Captain MacKenzie (sic) and Arbitrator Ross clearly did not prejudice the Frontier Pilots so as to deprive them of "a fundamentally fair hearing." See National Post Office Mailhandlers v. United States Postal Service, 751 F.2d 834, 841 (6th Cir. 1985). Petition, at 33a-34a.

Moreover, after thoroughly analyzing and distinguishing the line of cases now relied upon by the Frontier Pilots in arguing for a rearbitration of the Nicolau Award (Petition, at 48a-50a), the District Court explained in its Letter Opinion affirming the Ross Award (Petition, at 50a-52a):

> In my view, to the extent that Arbitrator Nicolau integrated the FAL pilots with the Continental pilots, the FAL and the Continental pilots became one body. Essentially, they had the same interests to protect. They each had a position on a pilot seniority list which they had attained as a result of the Nicolau Arbitration Award. I refused to allow the FAL pilots to argue for a change of their position on the seniority list vis-a-vis the Continental pilots in the

arbitration proceedings before Arbitrator Ross. If I permitted such conduct, then I would be encouraging a collateral attack on the award issued by Arbitrator Nicolau before the Colorado Supreme Court could issue a final determination on that award.

However, I permitted the FAL pilots to participate in the Ross arbitration in an effort to allow them to protect whatever position they had attained as a result of the Nicolau Award vis-a-vis the People Express pilots who were to be integrated by virtue of Arbitrator Ross' Award. Moreover, my order dated August 7, 1989, provided that any party may make application to this court, on short notice, to consider the impact, if any, of a reversal or modification of the Nicolau Award issued prior to the completion of the Ross arbitration proceedings. Since the Colorado Supreme Court has already affirmed the Nicolau Award, I refuse to change my position and collaterally overrule the Nicolau Award. Accordingly, I will not overturn the Ross Award on the basis of this argument. App. 919-20.

VI. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the decision of the District Court in a non-citable judgment order which does not disclose the reasoning of the Court of Appeals. Petition, at 59a-60a. Rehearing and

rehearing in banc were likewise denied without an explanatory opinion. Petition, at 62a-63a.

SUMMARY OF ARGUMENT

The Petition should be denied for two reasons. First, there is no conflict among the Circuits on either of the issues Petitioner seeks to raise. Second, this case does not present the issues that Petitioner describes. In particular, the role of a prior interest arbitration decision in a subsequent interest arbitration was not before the courts in the decisions on which Petitioner relies, and is not likely to recur. Moreover, on the rearbitration issue, the decisions of the courts below are in harmony with the decisions of other circuits which uniformly recognize that a grievance arbitrator has no power to overrule the prior decision of another grievance arbitrator on the identical factual matter determined. Both the Ninth and Third Circuits (which Petitioner contend conflict) applied the same rule by deferring to their respective district court's judgment involving whether, under all the circumstances

in the cases, a particular contact between an arbitrator and one party is grounds for overturning an award. In fact, the court below correctly upheld the decision of the district court, which correctly affirmed and enforced the thoughtful, thorough and well-reasoned decision of Arbitrator Jerome H. Ross merging the former People Express pilots into the combined Frontier-Continental pilot seniority list.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE REARBITRATION ISSUE THE PETITION DESCRIBES AND THIS CASE DOES NOT IN ANY EVENT PRESENT THIS ISSUE

The Frontier Pilots' main argument in their Petition boils down to a complaint that the decisions of the Court of Appeals and the District Court prevented them from collaterally attacking a seniority arbitration decision rendered on June 15, 1987, in which Arbitrator George Nicolau irrevocably determined where the Frontier pilots should be merged into the Continental pilots' seniority list.

App. 171-222. *See* Petition, at 12. The Nicolau Award was made "final and binding" by the express terms of the Job Preservation Agreement which was signed by the lawful representatives of the Frontier pilots and unanimously ratified by the Frontier pilots themselves during a membership referendum in October 1986. App. 149, 325-6, 342, 438. Moreover, in a procedural agreement signed in January 1987, the FAL pilot representatives stipulated the finality of Arbitrator Nicolau's slotting of FAL pilots into CAL's seniority list. App. 303-05. Consequently, the Court of Appeals and the District Court properly held the FAL Pilots to their contractual arrangements and preserved the integrity of the Nicolau Award.

The Frontier Pilots misplace their reliance on several cases which they erroneously cite for the propositions that the doctrine of *res judicata* does not exist in arbitration, and that a subsequent arbitrator must always be free to undo a prior arbitrator's precise dispute resolution in a different case. An analysis of

these cases reveals that they do not support the sweeping conclusions the Frontier Pilots draw from them -- even with respect to the issue preclusion context in the grievance arbitration setting in which they arose -- and that they have no relevance whatsoever to two successive interest arbitration proceedings such as those before Arbitrators Nicolau and Ross.

A. The Frontier Pilots Blur the Difference Between Interest and Grievance Arbitrations

All of the cases the Frontier Pilots rely upon involve the preclusive effect of an earlier grievance arbitration decision when a similar or related issue arises under a collective bargaining contract's grievance-arbitration clause requiring the submission of all disputes concerning the interpretation or application of that contract to arbitration. None of these cases resembles the case at bar, in which the District Court barred the Frontier Pilots from collaterally attacking Arbitrator Nicolau's interest arbitration determination

in the subsequent interest arbitration before Arbitrator Ross.

The critical difference between interest and grievance arbitrations relates to the nature of the underlying disputes each resolves. The Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, which covers both the airline and railroad industries, classifies disputes as "major" and "minor." In Railway Labor Act terminology an arbitral resolution of a "major" disputes is called an "interest" arbitration; it forms a new agreement. A "grievance" arbitration resolves a "minor" dispute by interpreting or applying an existing agreement to a new situation. This Court classified these two categories of disputes in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 1290 (1945):

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. * * * In either case the claim is to rights accrued, not merely to have new ones created for the future.

Arbitrator Emanuel Stein aptly characterized the function of an interest arbitrator as legislating for the parties: "The task is more nearly legislative than judicial." *New York Shipping Ass'n.*, 36 LA 44, 45 (1960). As Arbitrator Whitley P. McCoy noted in *Twin City Rapid Transit Co.*, 7 LA 845, 848 (1947):

> Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon considerations of policy, fairness, and expediency, of what the contract rights ought to be.

In view of this critical distinction between interest and grievance arbitrations, it is irrelevant what

the rule is with regard to the referral to arbitration of a subsequent contract interpretation dispute in the face of an earlier resolution of a similar contract interpretation question (successive grievance awards). Such a rule might foster labor stability by enforcing the parties' agreement to submit to arbitration all disputes arising during the term of their collective bargaining agreement, but it is simply inapplicable to cases like the present one involving successive interest arbitrations.

In the instant case, one interest arbitrator, Arbitrator Nicolau, has already exercised his commission to determine on a final and binding basis what the Frontier pilots' seniority rights are with respect to those of the Continental pilots. But the Frontier Pilots wished to depart from that decision by changing those seniority rights in a subsequent interest arbitration convened before Arbitrator Ross to establish the People Express pilots' seniority rights with respect to the combined Frontier-Continental pilot group. The

Frontier Pilots have failed to identify any labor policy that would be advanced by permitting them to relitigate a final and binding interest arbitration (the FAL pilots' own integration into the CAL Pilots' seniority list) in a subsequent case convened to settle a different matter (the PEX Pilots' integration into the combined FAL/CAL seniority list). More significantly, for present purposes, Petitioner has failed to identify another case in which any court has authorized a subsequent interest arbitrator to overrule the decision of a prior interest arbitrator on the same question, and the instant case thus does not present the issue described in the Petition or any other substantial question likely to recur.

B. The Frontier Pilots Mischaracterize the Precedent They Rely Upon

The cases cited by the Frontier Pilots do not stand for the propositions for which they cite them. The starting point in any analysis of arbitrability is this Court's instruction that the question of arbitrability is for the courts to decide, not arbitrators.

> [T]he question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 647, 649, 106 S.Ct. 1415, 1418 (1986). Clearly, whether a dispute is appropriate for arbitration is to be determined by the courts. Yet, contrary to this explicit allocation of judicial and arbitral tasks, the Frontier Pilots argue that the Court of Appeals and the District Court erred by determining that the dispute over how to merge the Frontier and Continental pilot seniority lists was no longer arbitrable (because it had already been decided by Arbitrator Nicolau) instead of referring the arbitrability issue to Arbitrator Ross. Petition, at 44-45. The Frontier Pilots thus have it precisely backwards when they claim that the District Court abused its discretion by making

an arbitrability determination instead of delegating it to Arbitrator Ross.

The Frontier Pilots' confusion derives from their failure to recognize that, in contrast to the present case, all of the cases on which they rely deal with an arbitrator's authority to resolve a dispute between parties (an employer and a union) to a collective bargaining agreement with a broad grievance-arbitration clause covering all disputes concerning the agreement's meaning or application. Unlike the instant case, all of the cases the Frontier Pilots cite concern a subsequent arbitrator's resolution of an earlier interpretative dispute under the contract was arguably to be given preclusive effect to bar the arbitration of a similar or related issue involved in the subsequent dispute.

In some of cases the Frontier Pilots cite (Petition, at 24-26, 29-37), the courts ruled that a subsequent dispute between the employer and the union over the extent to which their collective bargaining contract bars relitigation can itself constitute

a dispute covered by the mandatory arbitration provision of their collective bargaining contract. *See, e.g., Local 103, Int'l Union of Electrical Workers v. RCA Corp.*, 516 F.2d 1336, 1340 (3d Cir. 1975): "Does a dispute as to the application of the re-arbitration provision constitute an arbitrable question under the contract? We hold that it does." But that is of no relevance here because (1) there is no contractual basis for a second arbitration of the same dispute that Arbitrator Nicolau decided in 1987; and (2) there is no collective bargaining contract with a broad (or even a narrow) mandatory arbitration provision.

Nor is it meaningful here that some of the Frontier Pilots' cited decisions hold that an arbitrator's interpretation of a clause in a collective bargaining contract may not legally bind a subsequent arbitrator in the same sense that one court's edicts regarding an issue carry binding effect on another under the doctrine of *stare decisis*. Neither Arbitrator Nicolau nor Arbitrator Ross was construing a collective bargaining

agreement in order to resolve an interpretative issue arising under the agreement's broad grievance-arbitration clause. Rather, Arbitrators Nicolau and Ross were each creating a new agreement for the parties. The Frontier Pilots thus misconstrue the entire line of authorities on which they rely in seeking to apply cases on grievance arbitration to the present case involving interest arbitrations.

C. The Decisions of the Courts of Appeals and the District Court Are In Harmony with the Decisions of Other Circuits on the Rearbitration Issue

Well-reasoned decisions of the First, Third, Fifth, Seventh, Eighth and District of Columbia Circuits contradict the Frontier Pilots' thesis that courts should always permit arbitrators to determine what effect, if any, to give to prior arbitration awards. The Frontier Pilots simply ignore most of these decisions.

For example, in *Chambers v. Local Union No. 639*, 579 F.2d 375 (D.C. Cir. 1978), the initial arbitrator granted seniority integration, but the union and employer wrongfully defeated the award in a

subsequent grievance proceeding. The court held that the initial seniority arbitration was final and binding and the union "improperly attempted to use the second grievance as a vehicle for overturning the earlier decision" and that "[it] had no right to do this." *Id.* at 383. The Court of Appeals explained: "To whatever extent the decision on the second grievance attempted to reopen the seniority question settled by the [first arbitration] decision, it was void and was not itself entitled to any final and binding effect . . . ." *Id.* Consequently, the court refused to enforce the second decision and ordered appellees to pay damages.

The Frontier Pilots also omit any mention of *Boston Shipping Ass'n v. International Longshoremen's Ass'n*, 659 F.2d 1, 2, 4-5 (1st Cir. 1981), in which the court gave binding effect to a grievance-arbitration award defining the geographic boundaries of Berth 13 at the Castle Island terminal facility for purposes of determining manning requirements under the parties' collective bargaining agreement. Holding that "[the

arbitrator's] award was inherently prospective as to the dimensions of Berth 13," the court rejected the union's contention that the commencement of a new contract term voided prior awards and ruled that the employer was "entitled to enforce the arbitration award in the new contract term." *Id.* at 4-5. Arbitrator Nicolau's decision was likewise "inherently prospective," and the District Court correctly barred the Frontier Pilots from relitigating before Arbitrator Ross the precise dispute that Arbitrator Nicolau had already determined.

In extending "controlling" effect to the prior arbitration award to bar rearbitration of the same issue, the First Circuit in *Boston Shipping Ass'n*, *supra*, 659 F.2d at 4, accepted the reasoning of the Fifth Circuit in *Oil, Chemical & Atomic Workers v. Ethyl Corp.*, 644 F.2d 1044, 1051 (5th Cir. 1981), in which that court devised a test of "material factual identity." The Frontier Pilots fail to refer to the Fifth Circuit's explanation of its rule for applying the doctrine of issue

preclusion to successive grievance-arbitration cases, 644 F.2d at 1051:

> If, based on the evidence at trial, it is not even arguable that the current facts fall outside the [collective bargaining contract's] prohibition or within an exemption of the article in question, then a court can safely conclude that the defendant's conduct does not differ materially from the previously condemned actions and thus, that the defendant is committing a "like" violation of the bargaining agreement, in violation of the prior arbitration award. (Emphasis in original).

The Fifth Circuit categorically asserted that submission of a dispute to arbitration would be erroneous whenever it was "beyond argument that there is no material difference between the current facts and the facts on which the prior arbitration award was based. . . ." *Id.* at 1055. It is beyond argument that the Frontier Pilots seek a second arbitration before Arbitrator Ross on the manner in which the seniority lists of the Frontier and Continental pilots should be merged even though there was "material factual identity" with the Nicolau Award's key facts, *i.e.*, the

names and seniority numbers of the Frontier and Continental pilots.

Similarly, in *International Ass'n of Machinists v. Republic Airlines*, Inc., 829 F.2d 658, 662 (8th Cir. 1987), the Eighth Circuit concluded that "the district court rather than the arbitrator should decide whether the Board's decision regarding the 1984 grievances 'previously settled' the threshold catering issue, thereby rendering the new grievances inarbitrable." Applying this rule to the present facts, it is again obvious that the District Court, rather than Arbitrator Ross, properly decided whether the merger of the Frontier and Continental pilot seniority lists was "previously settled" by Arbitrator Nicolau and the Colorado state courts upholding the Nicolau Award. *See also United Electrical Workers v. Honeywell*, Inc., 522 F.2d 1221, 1228 (7th Cir. 1975) (a "strict factual identity" between the facts in both disputes is required to apply *res judicata* in arbitral context); *Avco Corp. v. Local 787 UAW*, 459 F.2d 968 (3d Cir. 1972) (same);

International Chem. Workers Union v. Purex, Inc., 427 F. Supp. 338, 339 (D. Neb. 1977), *aff'd*, 566 F.2d 48 (8th Cir. 1977) (same); *Graphic Arts Int'l Union, Local 97-B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088, 1096 (M.D. Pa. 1979) ("Of course, an arbitrator has no power to overrule a prior decision of another arbitrator. . . ."). *Cf. Fournelle v. N.L.R.B.*, 670 F.2d 331, 334 (D.C. Cir. 1982) ("it is simply inconsistent with the realities of labor arbitration to maintain that, without an express contractual term giving the results of past arbitrations precedential effect, the arbitrator's rulings are isolated utterances without a general application to the ongoing collective bargaining relationship.").

Nothing in any of this Court's decisions is to the contrary. None of this Court's decisions requires the judiciary to treat interest arbitration awards like the Nicolau Award and the Ross Award as "isolated utterances," subject to redetermination whenever another seniority merger arises. Indeed, all of the

cases the Frontier Pilots cite dealt with the preclusive effect of grievance-arbitration awards interpreting collective bargaining agreements.

Therefore, the Court of Appeals and the District Court correctly held that the Frontier Pilots were entitled to only one final and binding arbitration on the issue of their seniority placement with respect to the Continental pilots. The Frontier Pilots were properly barred from relitigating that exact question in the proceedings before Arbitrator Ross.[6]

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[6] Moreover, since the Judgment Order below lacks any "precedential or institutional value," it does not create a conflict with another court's decision. U.S. Ct. of App. 3rd Cir., Rules, App. I, IOP6.2.1. (Third Circuit Internal Operating Procedures). The Order was not published and cannot be cited by any future litigants; it applies only to the specific parties involved. *Id.*

II. THE ARBITRATOR'S BRIEF, CONSPICUOUS, NON-SUBSTANTIVE CONVERSATION WITH CAPT. MACKENZIE ON JULY 12, 1991 DOES NOT MERIT FURTHER REVIEW

A. There is No Conflict Among the Circuits With Respect to the Need to Treat Allegations of Ex Parte Communications Based on All of the Particular Circumstances Presented

The Third Circuit was entitled to defer to the District Court's finding that Arbitrator Ross conducted the lengthy and complex proceedings before him with fairness and impartiality on precisely the same rationale as the Ninth Circuit deferred to the lower court's determination of improprieties in *Pacific & Arctic Ry. Co. v. United Transp. Union*, 952 F.2d 1144 (9th Cir. 1991), a decision upon which the Frontier Pilots misplace their reliance (Petition, at 53-55). In *Pacific & Arctic*, the trial court found, unlike in the case at bar, that the supposedly "neutral" arbitrator had committed the functional equivalent of fraud on the railroad by socializing extensively with the union's partisan arbitrator during the recesses in their two-day hearing, by accepting gratuities from him, by refusing

to permit the railroad's attorney to put his case into evidence during the hearing, by proceeding with the hearing in the railroad's absence and by assisting the union to "shape" its case favorably during this one-sided hearing. *Id.* at 1146-47. In contrast, the Court of Appeals and the District Court in the present case found that no comparable misconduct or prejudice occurred here.

Indeed, Judge Politan expressly found that the Arbitrator's brief, conspicuous, non-substantive conversation with a People Express pilot did not deprive the Frontier pilots of a "fundamentally fair hearing" (App. 909-10), and the Third Circuit properly deferred to that finding. *Mutual Marine & Island Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 57 (3d Cir. 1989) ("burden of proof rests squarely on the shoulders of appellants to show that prejudicial *ex parte* communications took place."). *Accord In re Federal Skywalk Cases*, 680 F.2d 1175, 1183-84 (8th Cir. 1982), *cert. denied*, 459 U.S. 988, 103 S. Ct. 342 (1982)

(Despite *ex parte* contacts initiated by federal district judge, full record was developed on the complex questions at issue and his challenged class certification ruling was upheld because it was "carefully reasoned" and "based solely on his judgment such action would best serve the interests of all parties involved."). *See also Braniff Master Executive Council v. C.A.B.*, 693 F.2d 200, 227 (D.C. Cir. 1983) (airline's *ex parte* communications with Chairman and staff of federal agency regarding Labor Protective Provisions did not constitute a basis for overturning agency's ruling because they "did not give the Board any otherwise unstated information about the carrier's position on LPP's.").

The decision in *Pacific & Arctic* presents no conflict with the case at bar because the facts here are so different and because the courts of appeals in both cases applied the same rule of deference to the trial court's findings. The Ninth Circuit simply found itself with "one of the very rare cases" in which a court is

required to vacate an arbitration award based on fraud. *Pacific & Arctic*, 952 F.2d at 1149. However, both Courts of Appeals deferred to findings made by the District Courts; the fact that one arbitration award was set aside and the other was upheld merely derives from the respective District Courts' sharply contrasting findings of fact.

B. The Third Circuit's Acceptance of the District Court's Determinations That No Substantive Communications Occurred and That No Prejudice Resulted from the Challenged Conversation Negate Petitioner's Second Issue

In asking this Court to order lower courts to respect strictly any prohibition on *ex parte* communications between parties and their arbitrator, Petitioner urges adoption of a minimalistic standard for finding misconduct, which would admittedly lead to judicial invalidation of more arbitration awards. Petition, at 48-56. The FAL Pilots purportedly derive that standard from the Ninth Circuit's decision in *Pacific & Arctic Ry. & Nav. Co. v. United Transportation Union*, 952 F.2d 1144 (9th Cir. 1991). Petitioner claims

that the Court of Appeals in that case used a standard that dispenses with the need to show prejudice to a party resulting from an improper contact and that dispenses as well with all evidence of what in fact was said to the arbitrator. Petition, at 54.

In the instant case Petitioner erroneously claims that the Third Circuit required it to produce "direct evidence . . . that merits of litigation were discussed." Petition, at 54-55. In fact, both the Ninth and the Third Circuit Courts of Appeals deferred to the findings of the District Courts concerning the substantive or non-substantive nature the disputed contacts.

Under Petitioner's theory of the case, a court should automatically infer that the merits of the case were discussed (under the purported rule in *Pacific & Arctic*) from the mere occurrence of a conversation between Arbitrator Ross and Capt. Mackenzie, and Petitioner would have no burden of showing prejudice. Therefore, claims Petitioner, the seventy-two day

arbitration award should be set aside simply because Arbitrator Ross and Capt. Mackenzie spoke to each other outside the hearing of the other parties. Whether they discussed only the time the next meeting was to begin, the weather, or the presidential campaign would be of no consequence. Nor would the boycotting of such a conversation by the other parties be relevant under Petitioner's theory. Instead, once Petitioner proved a conversation occurred, the conversation, no matter how trivial, would be enough to justify vacating any arbitration award. There would be no need for any discovery concerning the content of the conversation. That is certainly not the law and the question thus posed does not merit review by this Court.

Moreover, since the court below accepted the District Court's explicit finding that no prejudice resulted from Arbitrator Ross's brief conversation with a People Express pilot, whether or not findings on prejudice are required in general is not an issue in this

case. Here, the Court of Appeals properly deferred to the District Court's findings that the uncontradicted evidence in the trial court revealed no prejudice to the Petitioner.

C. There is No Conflict Among the Circuits Regarding the Duty of the Judiciary to Affirm Arbitration Awards in Which, As Here, All Parties Received a "Fundamentally Fair Hearing"

Whatever might be said of the Ross-Mackenzie exchange, moreover, it is surely no basis for invalidating the results of a lengthy, complex and hard-fought arbitration. An arbitral error requiring judicial reversal "must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968), *cert. denied*, 393 U.S. 945, 89 S.Ct. 378 (1968). As Associate Justice Stewart (Retired) explained in a case in which he sat by designation on the Sixth Circuit Court of Appeals, *National Post Office Mailhandlers v.*

United States Postal Service, 751 F.2d 834, 841 (1985), and in which the District Court and the Court of Appeals upheld the award of an arbitrator accused of "dozing off" repeatedly during the hearing:

> Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing. See Grahams Service, Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982) (citing cases).

Furthermore, arbitrators are not held to the same procedural standards as judges. Justice White's Concurring Opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 848 (1969), recognized this principle, and it has gained widespread acceptance among federal trial and appellate courts. As District Judge DuBois explained in *Yorkaire, Inc. v. Local Union No. 19, Sheet Metal Workers*, 758 F. Supp. 248, 256 (E.D.Pa. 1990), *aff'd*, 931 F.2d 53 (3d Cir. 1991):

> Justice White reasoned that arbitrators should not [be] held to the standards of judicial decorum of Article III judges

> because '[i]t is often that because they [arbitrators] are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.' *Id.* at 150, 89 S.Ct. at 340 (White, J. concurring).

Here, Arbitrator Ross's extensive experience as a labor mediator may well have enhanced his acceptability to the parties in this case and his discussion with Capt. Mackenzie on July 12 concerning the continuation of the Technical Support Committee sessions is understandable and non-prejudicial in view of this background. Arbitrator Ross's style, albeit not that of an Article III judge, was fully consistent with the post-hearing Technical Support Committee phase of the arbitration in which the parties were then voluntarily engaged. Especially in view of the extensive hearing time and oral closing arguments made available to all parties and the lengthy briefs submitted to the Arbitrator, the Arbitrator's brief, conspicuous, non-substantive conversation with Capt. Mackenzie cannot be said to have so prejudiced the Frontier Pilots as to

have "denied a fundamentally fair hearing" to them. App. 910.[7]

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[7] Two decisions the Frontier Pilots cite concerning *ex parte* communications are totally inapposite. *Totem Marine Tug & Barge v. North Am. Towing*, 607 F.2d 649 (5th Cir. 1979), involved Totem's termination of a time charter agreement with another carrier, North American, which had requested only return expenses, but received damages from the arbitration panel as well. Each of the arbitrators had a different figure for calculating damages, and the arbitrator appointed by North American telephoned North American's counsel, who provided a figure which did not match any of the figures of the members of the arbitration panel. Totem was never notified of this call, nor given a chance to respond to the figure, which the panel used to calculate the amount of damages. The court vacated the award, holding that receipt of this crucial evidence by the arbitrator, along with the expansion of the award beyond the amount requested by North American, constituted arbitral misbehavior prejudicial to Totem's rights. *Id.* at 653.

The substantive nature of the conversation in *Totem* clearly renders this decision inapplicable here, where no discussion of the merits of the case occurred. The secret nature of the *Totem* contact also makes it entirely unhelpful in the present case, in which the Arbitrator told the other parties that he would be talking to Capt. Mackenzie about the letter his colleagues on the Technical Support Committee had just distributed, and they all observed the conversation taking place.

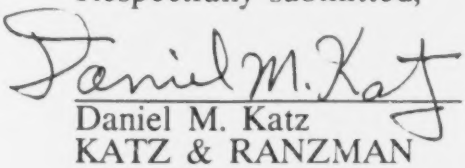
Similarly inapt is *United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978), in which two carriers petitioned the Federal Maritime Commission (FMC) to amend a joint service agreement to add a third party. Notice of the petition was published in the Federal Register, as required by the Shipping Act, and U.S. Lines filed comments. The FMC initially denied the petition to add the third party to the joint service agreement; however, without notice to U.S. Lines or the public, it later reversed itself and allowed the addition. During the period between the two rulings, the FMC received notices from the French and German governments supporting the addition of the third party, but these notices were never made available to U.S. Lines or the public. The court determined that, contrary to the statutory "hearing" requirement, these *ex parte* communications with the FMC were employed to introduce new arguments and positions and to respond to and rebut the arguments made by U.S. Lines in its public filings. *Id.* at 538, 539. The court therefore refused to uphold the FMC's decision to allow the addition of the third party. *Id.* at 541.

The same distinguishing factors evident in the *Totem* case thus also appear in the *U.S. Lines* case. The communications in question related to the merits of the pending case, unlike those between the Arbitrator and Capt. Mackenzie, and the losing party had no way of knowing at the time that any communications had occurred. Moreover, *U.S. Lines* did not even involve an arbitration, but the deliberations of an agency of the federal government.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should deny the Petition.

Respectfully submitted,



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Dated: August 10, 1992

Thus, neither of the two cited cases supports the Frontier Pilots' position here or creates a conflict among the circuits.

No. 92-63

Supreme Court, U.S.
FILED
AUG 10 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

FRONTIER PILOTS LITIGATION STEERING COMMITTEE, INC.,
Petitioner,

v.

CONTINENTAL AIRLINES, INC., CONTINENTAL PILOTS MERGER COMMITTEE, PEOPLE EXPRESS PILOTS MERGER COMMITTEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 10, 1992

QUESTIONS PRESENTED

1. Where a group of employees represented by petitioner agreed to and received a "final and binding" arbitration that integrated them into the seniority list of an acquiring company's employees, did the court of appeals correctly affirm the district court's order precluding them from collaterally challenging the result of that arbitration in a second arbitration convened to integrate the seniority of another group of employees acquired as part of the same transaction?

2. Following the close of evidence in a lengthy arbitration, where the arbitrator briefly met with one party in full view of the other parties and did not discuss any pending issues, and the district court found as fact that the meeting did not prejudice petitioner, did the court of appeals correctly affirm the district court's confirmation of the arbitrator's award where petitioner failed to show that the district court's fact finding was clearly erroneous and instead petitioner sought a *per se* rule requiring vacation of arbitration awards issued after *ex parte* contacts?

PARTIES TO THE PROCEEDING

The petition for certiorari (page iv) correctly identifies four of the parties to the proceeding in the court of appeals. However, the caption of the case in the court of appeals included additional appellees: Texas Air Corp.; People Express Airlines, Inc.; and People Express, Inc. As of July 11, 1989, People Express Airlines, Inc. and People Express, Inc. ceased to exist; respondent Continental Airlines, Inc. is their successor in interest. As of June 6, 1990, respondent Texas Air Corp. was renamed Continental Airlines Holdings, Inc.

The petition for certiorari (page iv, fn. 2) correctly states that Frank T. Shanley, whose name appears in the caption of the judgment order issued by the court of appeals, was replaced by, and is represented by, the Continental Pilots Merger Committee. In fact, all of the individual persons whose names appear in that caption[1] were replaced by, and are represented by, the Continental Pilots Merger Committee.

The following information is provided pursuant to Rule 29.1 of this Court's Rules. Respondent Continental Airlines Holdings, Inc. is a publicly held corporation and is the holding company of numerous privately held affiliates and subsidiaries, including several airlines of which Continental Airlines, Inc. is one. Continental Airlines Holdings, Inc. owns 50% of TAC/SAS Quality Service Institute, Inc.; the remainder is held by Scandinavian Airlines System. Continental Airlines, Inc. owns 50% of Continental-Eastern Sales, Inc. ("CESI"); the remainder is held by Eastern Air Lines, Inc.

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[1]Gary Armentrout, Bill Autrey, R.S. Broadwater, John Campbell, Andy Cashetta, Stan Challgren, C.P. Conrady, Brian Craven, H.A. Cooper, John Gaylord, Don Gentry, John Giacchi, Larry Green, David Heekin, Charlie Higdon, Charlie Huff, Darrell Johnston, Alan King, H.F. Maroney, Neil A. Miller, Jim Northington, Steve Olsen, John F. Painter, Ken R. Quick, David Ross, C.A. Schepacarter, A.G. Sinibaldi, Jim Skelton, Tom E. Stephens, and Jack Stice.

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In The
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No. 92-63

FRONTIER PILOTS LITIGATION STEERING COMMITTEE, INC.,

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v.

CONTINENTAL AIRLINES, INC., CONTINENTAL PILOTS MERGER COMMITTEE, PEOPLE EXPRESS PILOTS MERGER COMMITTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Continental Airlines Holdings, Inc. and Continental Airlines, Inc. ("Continental") respectfully request that this Court deny the petition for writ of certiorari submitted by petitioner Frontier Pilots Litigation Steering Committee, Inc. seeking review of the Third Circuit's unpublished judgment order in this case.

OPINIONS BELOW

The petition for a writ of certiorari (page 2 and Appendix) correctly identifies the relevant opinions and judgments delivered in the district court and the court of appeals.

JURISDICTION

The petition for a writ of certiorari (page 3) correctly identifies a basis for invoking this Court's jurisdiction.

STATEMENT OF THE CASE

This case involves two arbitrations that followed Continental's acquisition of two other airlines: Frontier Airlines, Inc. ("Frontier") and People Express Airlines, Inc. ("People Express"). As part of the acquisition, the pilots at each of those two acquired airlines were given a right to arbitrate their integration into the pre-existing seniority list for pilots at Continental. The former Frontier pilots received their arbitration first under an arbitration agreement that they negotiated with Continental. When the former People Express pilots thereafter pursued their own arbitration under a different arbitration agreement, the Frontier pilots intervened and sought to use the second arbitration as a vehicle for challenging the result of their own arbitration. The district court and the court of appeals precluded the Frontier pilots from challenging the first arbitration award in the second arbitration.

1. Frontier Went Bankrupt, And Continental Expressed An Interest In Acquiring It.

Petitioner represents 270 pilots who formerly worked for Frontier[1] and who now are among the 4,158 pilots who work for Continental. Frontier was a wholly-owned subsidiary of People Express, Inc. In August, 1986, Frontier ceased all flight operations, terminated virtually all employees, and filed for bankruptcy reorganization relief in the United States Bankruptcy Court for the District of Colorado.

Shortly thereafter, Texas Air Corp. ("Texas Air"), the parent corporation of Continental, expressed an interest in purchasing the assets and stock of Frontier. Texas Air also wanted to acquire People Express, Inc.'s three operating air carriers: People Express and two other airlines. On September 15, 1986, Texas Air and People Express, Inc. entered into an Agreement and Plan of Merger to accomplish this. J.A. at 17-77.

2. The Parties Reached Agreement On Arbitration, And The Government Approved The Transaction.

Pursuant to their agreement, Texas Air and People Express, Inc. filed an application with the United States Department of Transportation seeking approval of the transaction. J.A. at 78-98. Included with that filing were two documents respectively providing for seniority integration arbitrations for the two acquisitions.

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[1]Petitioner is an incorporated organization that represents the former pilots of Frontier Airlines in litigation pursuant to powers of attorney granted by those pilots. Joint Appendix from the court of appeals at 331-32 (hereinafter cited as "J.A. at __."). The district court certified petitioner as the class representative for the former Frontier pilots in this case. J.A. at 383.

The first document providing for an arbitration was the draft Frontier-Continental Job Preservation Agreement ("JPA"), also referred to as the "Union Agreement." J.A. at 99-131. The draft JPA provided, *inter alia*, that Continental would acquire certain assets of Frontier while simultaneously extending job guarantees to former Frontier employees.[2]

The second document providing for an arbitration was the Labor Protection Agreement ("LPA"), an agreement between Texas Air and People Express, Inc.[3] J.A. at 15-16. This was the document that the district court eventually determined gave the People Express pilots a right to a seniority integration arbitration.

Commencing on September 15, 1986, Continental engaged in intense negotiations over the JPA with the Frontier pilots, their union, and their counsel. Continental and the Frontier

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[2]In pertinent part, the JPA stated:

> As soon as determined practicable by Continental, former Frontier pilots shall be merged into Continental's pilot System Seniority List pursuant to fair and equitable seniority integration procedures, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator . . . . *Said Neutral shall take special notice of the non-operating status of Frontier Airlines immediately prior to the date of this Agreement and the limited employment prospects for Frontier employees resulting therefrom.*

[3]The LPA parallelled the language of the JPA, except that it did not include the language about the non-operational status of Frontier. The LPA provided in pertinent part:

> Following consummation of the aforesaid Merger Agreement, in the event of a future merger of airline operations involving any air carrier subsidiary of People Express, Inc., provision shall be made for fair and equitable seniority integration procedures, for affected employees . . ., which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator . . . .

pilots moved the JPA's seniority provisions into a separate "Side Letter No. 2," which was incorporated into the JPA. That side letter included substantially the same language for integration of the Frontier pilots that had appeared in the draft JPA filed with the Department of Transportation. The Frontier pilots then approved the JPA and Side Letter No. 2 by unanimous vote at a union-conducted meeting. J.A. at 132-51.

Thereafter, the Department of Transportation approved the transaction. J.A. at 159-70. It stated that it would not impose labor protective provisions (*i.e.*, it would not impose upon the parties any requirements relating to the integration of the acquired employees). In making that determination, the Department of Transportation cited to Frontier's cessation of operations, Texas Air's agreement to hire a significant number of Frontier employees, the Merger Agreement's clause allowing Texas Air to withdraw if the Government imposed labor protective provisions, and the likelihood that Texas Air in fact would do so. The bankruptcy court in Colorado also gave its approval to the relevant agreements, including the JPA and Side Letter No. 2. J.A. at 243, 412.

3. The First Arbitrator Integrated The Frontier Pilots Into the Continental Pilot Seniority List, And The Colorado State Courts Upheld That Award.

The Frontier Pilots thereupon selected a merger committee, as did the Continental pilots. The two committees along with Continental then executed a document specifying arbitration procedures consistent with Side Letter No. 2. The procedures document stated that the decision of the arbitrator would be "final." J.A. at 303-05.

The seniority integration dispute between the Frontier and Continental Pilots was submitted to arbitration pursuant

to the JPA, Side Letter No. 2, and the negotiated procedures document. Hearings were held before an experienced airline arbitrator, George Nicolau. On June 15, 1987, Arbitrator Nicolau rendered his 57-page final Opinion and Award ("Nicolau Award"). Arbitrator Nicolau rejected virtually all of the Frontier pilots' contentions made during that arbitration. However, despite their lack of career expectations at Frontier, Arbitrator Nicolau integrated the Frontier pilots in such a way that 162 of them were able to bid for and hold Captain positions at Continental.[4] J.A. at 171-222.

The former Frontier pilots, dissatisfied with Arbitrator Nicolau's decision, filed a petition to vacate the award in the trial level court of the State of Colorado. J.A. at 307-22. In general, they argued that the arbitration which they had received was not the "fair and equitable" arbitration which they had been guaranteed by virtue of the JPA.[5] On June 30, 1988, the state court dismissed the petition.[6] J.A. at 323.

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[4]Arbitrator Nicolau's Award included language that it had prospective effect and was to govern all future seniority list concerns between the Frontier and Continental pilots: "Following the implementation of this Integrated Seniority List, the future job bidding, status, furloughs and recall rights of Continental pilots, including former Frontier pilots, shall be determined on the basis of said List . . . ." J.A. at 219, 221.

[5]This was also the original position taken by the Frontier pilots at the time they moved to intervene in the instant litigation. It was only after they were successful in intervening that they claimed the JPA did *not* provide for the same "fair and equitable" arbitration standard specified in the LPA.

[6]The Colorado Court of Appeals affirmed. J.A. at 487. The Colorado Supreme Court denied certiorari. Petitioner's Appendix at 47a (hereinafter cited as "Pet. App. at __").

4. The Frontier Pilots Were Permitted To Intervene Into The People Express Pilots' Seniority Arbitration To Protect Their Interest In The First Award.

Following the above rulings, the Frontier pilots claimed that they feared the loss of what they had secured in the decision by Arbitrator Nicolau to the People Express pilots if the New Jersey District Court were to order an arbitration under the LPA. Thus, in October, 1988, the Frontier pilots moved to intervene in that litigation, in which the People Express pilots were seeking an arbitration to integrate People Express pilots into the Continental pilot seniority list.[7] J.A. at 324-57. The Frontier pilots explained in their moving papers that, "[w]hile *the seniority rights of the Frontier pilots at Continental were already decided in a prior arbitration proceeding*, the Frontier pilots must be represented during the Continental-People Express arbitration to protect their existing seniority rights." J.A. at 340 (emphasis supplied). At the hearing on the motion, the Frontier pilots' counsel admitted that their "primary interest [was] to protect that which was awarded [them] in arbitration in Colorado." J.A. at 360. Of particular note, their counsel admitted, "*We acknowledge the Nicolau award, which we are, by the way, trying to set aside [in the then-pending Colorado State court proceedings]. But we acknowledge it and we recognize that it is final and binding absent it being set aside.*" J.A. at 366. Based on the above representations, the district court granted the motion. J.A. at 368, 383. The district court explained its rationale as follows:

> Pursuant to an arbitration award filed in June of [1987], the Frontier pilots became fully integrated

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[7]The New Jersey litigation had been commenced by the People Express pilots on April 1, 1987. J.A. at 1. The Frontier pilots had been aware of that litigation well before their intervention. J.A. at 332.

> into the Continental pilot work force. However, the arbitrator's opinion and award is currently being challenged by the Frontier pilots in the Colorado Court of Appeals. The list established by the arbitrator remains in effect pending resolution of the appeal by the Colorado Court. The pilots now seek to intervene in this litigation *to prevent a possible change in their existing seniority status* that may result from this litigation. . . . Therefore, to ensure that the Frontier pilots' interests in this judicial proceeding are adequately represented, I will grant their motion for intervention.

J.A. at 370-74.

Following a bench trial in April, 1989, the district court granted the People Express pilots' request for arbitration. J.A. at 426-28. The district court then asked the Frontier pilots to explain why they, as fully integrated Continental pilots, should not be bound by the Nicolau Award. J.A. at 963-64. In answering that question, the Frontier pilots admitted that they "would prefer an early resolution by this [District] Court of any claim of *res judicata*. . . . [T]he Frontier pilots would prefer that this [District] Court consider the merits of any contention regarding the effect of the Nicolau Award. A prearbitration determination would be preferable from a practical standpoint." J.A. at 435-36. On August 7, 1989, the district court accomodated that request, ruling in advance of the LPA arbitration that the Frontier pilots' role was solely to preserve the Nicolau Award, the very ground upon which they had sought and been permitted to intervene. Pet. App. at 2a-3a.

5. The Second Arbitrator Declined To Rearbitrate The First Award, And He Then Heard Evidence To Integrate The People Express Pilots.

Subsequently, the Frontier pilots took the position that the LPA arbitrator had the authority to interpret the language of the August 7, 1989 order defining their role in the LPA arbitration. J.A. at 484. After Jerome H. Ross, Esq. was selected as the arbitrator, Continental took up the Frontier pilots' invitation and asked him, by way of a motion *in limine*, to rule that the Frontier pilots could not challenge the Nicolau Award in the LPA arbitration. J.A. at 617. Arbitrator Ross granted that motion, noting that the Frontier pilots had sought intervention solely to protect the results of the Nicolau Award, and that the district court had granted intervention on that ground. J.A. at 488-502. The Frontier pilots moved Arbitrator Ross to reconsider, arguing that he had committed a serious error. The Frontier pilots explained, "*The [Frontier pilots] Committee believes . . ., consistent with Third Circuit law as quoted above, that [the district court] did not intend to usurp the unique role of the arbitrator in construing or giving weight to a prior arbitration proceeding . . . .*" J.A. at 512 (emphasis supplied). Arbitrator Ross reaffirmed his prior ruling, and the district court affirmed in an interlocutory ruling. J.A. at 513-29.

The four parties presented seventy-two days of evidence to Arbitrator Ross. The transcript of the hearing is 16,725 pages long. Almost 2,000 exhibits were admitted into evidence. Counsel submitted over 1,000 pages of post-hearing briefs, followed by a day of oral argument. With the record closed, the arbitrator was faced with the task of integrating 1,061 former People Express pilots into the combined seniority list of 557 Frontier pilots, 2,286 pre-merger Continental pilots, and over 1,300 Continental pilots hired since the merger. Thus, determining *how* the list should be structured in theory was only half the problem; the arbitrator was also required to

translate his concept for a list into an array of actual names which would constitute his Award. To accomplish this formidable task, Arbitrator Ross determined that, after he had made his basic decision, he wanted a committee composed of representatives from each party to assist him in the technical aspects of drafting the list, which it was anticipated would be performed using computer runs. J.A. at 607-11; Pet. App. at 34a-44a.

6. After The Record Was Closed, The Second Arbitrator Briefly Met With A People Express Pilot To Discuss A Procedural Matter, And The Frontier Pilots Did Not Object.

After the record was closed, Arbitrator Ross met with the parties' computer specialists on seven occasions. J.A. at 618. During one such session, the People Express pilots threatened to withdraw from the computer support process. Because Arbitrator Ross had found those sessions invaluable, J.A. at 748 and 782, he requested a brief meeting with Mr. Mackenzie, Chairman of the People Express Pilot Merger Committee, to request their continued participation. J.A. at 750. The Frontier pilots were in full view of the arbitrator before he met with Mr. Mackenzie, *id.*, and they admit both that they saw the arbitrator walk into the room with Mr. Mackenzie and that they did not make any effort to participate or object. J.A. at 748, 753, 782, 794. According to both Arbitrator Ross and Mr. Mackenzie, during their fifteen- to thirty-minute conversation there was no discussion of how to integrate the People Express Captains relative to the Frontier Captains, and Mr. Mackenzie made no attempt to influence the arbitrator with regard to any other part of the seniority list. J.A. at 748-50.

7. The Second Arbitrator Issued His Award, Which Was Confirmed By The District Court And Affirmed By The Third Circuit.

On August 13, 1991, Arbitrator Ross issued his Opinion and Award ("Ross Award"). J.A. at 612-746. His explanation for his Award is 133 pages long. *Inter alia*, Arbitrator Ross noted that the Frontier pilots had chosen to preserve their jobs by signing the JPA and its Side Letter No. 2. J.A. at 726, 741. While he weighed the equities brought to Continental by the Frontier pilots, J.A. at 728, he determined that the People Express pilots were entitled to greater seniority than where Arbitrator Nicolau had placed the Frontier pilots on the Continental pilot list.[8] J.A. at 739-41. The district court affirmed this determination by an order dated November 22, 1991. J.A. at 899-900.

In the opinion that followed on November 26, 1991, the district court explained the restriction on the Frontier pilots contained in the August 7, 1989 order. The district court explained that the Nicolau Award made the Frontier pilots fully integrated Continental pilots, and that the Frontier pilots had been permitted to intervene to protect that relationship from encroachment by the People Express pilots in their arbitration before Arbitrator Ross. The district court observed that allowing the Frontier pilots to reargue their seniority relative to the Continental pilots would have constituted a "collateral attack" on the Nicolau Award in the federal courts where the Colorado State courts had refused to grant such relief on direct appeal. Pet. App. at 50a-52a.

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[8]Petitioner attributes various statements to Arbitrator Ross to the effect that he would have rendered a different award were it not for the district court's August 7, 1989 Order. Pet. at 45-46. These statements are not part of the arbitral record, but come from affidavits of the Frontier pilots and their counsel drafted after Arbitrator Ross's Award was issued. J.A. at 752-808.

The district court also rejected the Frontier pilots' argument that the *ex parte* communication with Arbitrator Ross required vacation of his Award. The district court held that, given the openness with which the arbitrator had met with Mr. Mackenzie, it was "baseless" to suggest that anything improper had occurred during their meeting. First, the district court made a factual finding that they had discussed only the People Express pilots' continued participation in the computer process. Second, the court found it "important" that the conversation took place long after the hearings were concluded and the record was closed. Finally, the court found that the discussion "clearly did not prejudice the Frontier Pilots . . . ." Pet. App. at 31a-34a.

The Frontier pilots appealed to the Third Circuit. Three days after oral argument, the court of appeals affirmed the district court by an unpublished judgment order. Pet. App. at 58a-60a. The Frontier pilots petitioned for rehearing, conceding that disposition by such orders is reserved for "only the most frivolous of cases []." The court of appeals denied the petition for rehearing in another unpublished order dated April 10, 1992. Pet. App. at 62a-63a.

REASONS FOR DENYING THE WRIT

There is nothing about this case that merits review by this Court. The Frontier pilots are not complaining here about the arbitration that they received in 1987 (indeed, the Colorado courts rejected their arguments about that arbitration, and they did not petition this Court for review). Instead, the Frontier pilots are complaining here because, after they were permitted to intervene in *someone else's* arbitration based on the same historical facts, they were not allowed to use that second arbitration to collaterally challenge the result of their own arbitration. Both the district court and the court of appeals properly declined to afford them this "second bite at the apple."

This case further presents an unusual and highly fact-specific situation unlikely to be repeated, and it therefore is not of sufficient importance to warrant review by this Court. The corporate transaction that gave rise to these issues involved the almost simultaneous acquisition by one airline of two employee workforces from other airlines. In seeking the Government's approval of the transaction, respondents filed two different arbitration documents providing for the integration of those employees into the existing seniority list on a one-time basis. The district court's order respected the one-time nature of each of those arbitration documents. The court of appeals affirmed without opinion. Accordingly, there is virtually no precedential importance to this case.[9] It is unlikely that there would be a repetition of such a situation, where an employee group received a seniority arbitration conducted pursuant to one arbitration agreement and thereafter sought to challenge the result in a seniority arbitration for another employee group conducted pursuant to another arbitration agreement.

The conflicts asserted by petitioner between the decision of the Third Circuit and decisions of this Court do not exist. As an initial matter, the Third Circuit's unpublished judgment order is incapable of creating the "conflict" argued by the petitioner. Further, the court of appeals correctly affirmed the district court, because this Court repeatedly has stated that the arbitrability determination is within the province of the court, not the arbitrator. Nor are the lower federal courts commonly departing from this precept, as asserted by petitioner.

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[9] *See* Third Circuit Internal Operating Procedures §§ 6.2.1-6.2.2 (a judgment order is used when a written opinion will have no precedential value, the district court's findings of fact are not clearly erroneous, and there is no error of law).

Finally, the *ex parte* communication issue does not present a conflict with the Ninth Circuit decision cited by petitioner, for the same reason; the Third Circuit's judgment order has no explanatory or precedential value. In any event, Third Circuit case law is consistent with the decisions of the Ninth Circuit and other lower federal courts in requiring a showing of prejudice before an arbitration award will be vacated on the basis of an *ex parte* communication with the arbitrator. The district court here made factual findings that there was no prejudice to petitioner. Nothing in the record suggests that those findings are in any way erroneous, and the circumstances do not suggest even an appearance of impropriety so as to call for an exercise of this Court's supervisory power.

I. The Arbitrability Issue Presented Is Unusual And Fact-Specific, And It Does Not Warrant Review By This Court.

This case involves an "interest arbitration," *i.e.*, a hearing to determine the respective rights of the parties rather than to interpret a contract establishing those rights. *See generally* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 98-99 (BNA 4th ed. 1985); *see also id.* at 98-107, 146-47. As petitioner argued in the district court:

> [T]his is not a traditional arbitration. First, the arbitration was ordered by this Court . . . . Second, this is not the usual one or two day hearing settling some interpretation or application of a contract. Rather, it is an unprecedented four-way *interest* arbitration in which the arbitrator is charged with integrating the pilots of three different airlines . . . .

J.A. at 540-41 (emphasis in original).

Petitioner now seems to have forgotten both this critical distinction between grievance and interest arbitrations and the unique circumstances under which this case arose. Petitioner now seeks to treat this case as if it involved a routine grievance arbitration where the issue is whether a prior discharge arbitration as to Employee A constitutes an interpretation of the contract that binds a subsequent arbitrator charged with ruling on a grievance over the discharge of Employee B. This is not such a case. Here, one arbitrator's decision was made under one arbitration agreement, and the second arbitrator's decision was made under a separate arbitration agreement. There is no authority whatever for either arbitrator to rule upon or limit the issue presented to the other. Therefore, virtually all of petitioner's legal discussion is inapposite.

Petitioner cites several cases to the effect that it is for the arbitrator, not a court, to determine whether the dispute was intended to be covered by a prior arbitration award.[10] Pet. at 23-43. The district court properly found those cases to be inapposite. Pet. App. at 49a. Those cases involved collective bargaining agreements with broad arbitration clauses under which many disputes could be submitted for arbitration under the same agreement, sometimes years apart.[11] In the instant case, no collective bargaining agreement is involved. Neither the LPA nor the JPA contains a broad arbitration clause covering all disputes between the parties. Rather, they are situation-specific documents, each separately providing for *one*

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[10]Given that the Frontier pilots wanted Arbitrator Ross to free them from the outcome of the Nicolau Award, a more analogous line of cases would be those which observe that an arbitrator has no power to *overrule* a prior decision of another arbitrator. *See, e.g., Graphic Arts Int'l Union Local 97-B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088, 1096 (M.D. Pa. 1979).

[11]For example, in the "leading case" cited by petitioner, the two arbitrations occurred 25 years apart. Pet. at 24 (citing *Local 103, IUE v. RCA Corp.*, 516 F.2d 1336 (3d Cir. 1975)).

interest arbitration to each employee group affected by the September 15, 1986 transaction.[12]

Interest arbitration, by definition, is a one-time method for settling the rights of parties. For this reason, no arbitrator in the United States airline industry — in over 40 seniority integration arbitrations — ever has rearranged the relative seniority of two employee groups as integrated by an arbitrator from a *prior* airline merger. It is all the more unusual, therefore, that the petitioner should advocate allowing an arbitrator to rearrange the relative seniority of two employee groups as integrated by a prior arbitrator whose authority was a separate arbitration agreement dealing with the *same* transaction. There is no warrant for this Court's review.

II. The Third Circuit's Decision Is Not In Conflict With Decisions Of This Court Or Those Of Other Circuits.

Petitioner argues that the court of appeals created a conflict with this Court's decisions and the decisions of other lower federal courts by upholding the district court's determination to rule on the arbitrability issue itself, instead of reserving that issue for Arbitrator Ross. Pet. at 21-47. Assuming *arguendo* that the Third Circuit's judgment order has any precedential value at all (which it does not, *see supra* note 9), it is consistent with this Court's teachings and the law in other circuits.

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[12] *See* Elkouri & Elkouri, *supra*, at 225 ("Since collective agreements generally do not provide for the arbitration of 'interest' disputes that might arise in the future, the agreement to arbitrate such disputes most often is entered into after the dispute has materialized and at a time when the issues can be defined. In such cases the parties will use one instrument only, which will contain full provision for the arbitration.").

The starting point for determining arbitrability is whether the arbitration clause encompasses the present dispute. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 648 (1986). Under this Court's decisions, "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court," *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), and not by the arbitrator. *Accord AT&T*, 475 U.S. at 649.

In this case, the district court made a garden-variety application of this doctrine. It determined that Continental was bound to let the People Express pilots arbitrate their seniority integration because the LPA encompassed that dispute. Having permitted the Frontier pilots to intervene in the LPA arbitration on other grounds,[13] the district court then had to determine whether to bind them to their JPA arbitration or leave that question open for Arbitrator Ross.

Petitioner argues that because the LPA was silent on the issue of the effect of prior arbitrations,[14] the district court should have left the question open for Arbitrator Ross. Pet. at 26-28. This argument ignores petitioner's repeated statements, which were the predicate for intervention, that it

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[13]Petitioner suggests that the district court found that the Frontier pilots, like the People Express Pilots, were third-party beneficiaries of the LPA and that they were permitted to intervene on that basis. Pet. at 4-5, 7, 27. To the contrary, the Frontier pilots were permitted to intervene solely to protect their seniority as awarded under the JPA. At no time did the district court find that the LPA covered the seniority dispute between the Frontier and Continental pilots.

[14]It is not surprising that the LPA lacks a clause addressing the effect of prior arbitrations. As noted *supra* at note 12, the LPA is an interest arbitration agreement, which typically involves only *one* issue and *one* arbitration to resolve it.

would not challenge the effect of the prior JPA arbitration. Moreover, all of the evidence "show[s] that the parties intended the [JPA] to be their 'chosen instrument for the definitive settlement' of the dispute in this case" between the Continental and Frontier Pilots. *UMW v. Consolidation Coal Co.*, 666 F.2d 806, 810 (3d Cir. 1981) (citation omitted). There is no doubt that the JPA-based Nicolau Award was intended to cover the same dispute between the Frontier and Continental pilots that petitioner sought to rearbitrate before Arbitrator Ross,[15] and that petitioner sought resubmission of the dispute to Arbitrator Ross only because the Frontier pilots were dissatisfied with the earlier Nicolau Award. Thus, even under the line of collective bargaining cases cited by petitioner (which are inapposite), the district court properly refused to return the Continental-Frontier dispute to arbitration, since the district court could "say 'with positive assurance' that the [earlier] award or settlement was intended to cover the dispute." *Consolidation Coal*, 666 F.2d at 811 (referring to *United Steelworkers of America v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582-83 (1960)). *See also IAM v. Republic Airlines, Inc.*, 829 F.2d 658, 661 (8th Cir. 1987) (court denied union's action to compel second arbitration because "[i]n the present case, there is no identity of issues question. To the

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[15]Petitioner argues that the 1987 JPA arbitration did not present the same issues and facts that were involved in the 1990-1991 LPA arbitration. Pet. at 28-29 & n.3. Petitioner relies on the district court's observation that the issue *properly* before Arbitrator Ross (the integration of the People Express pilots into the combined Continental-Frontier list) was not the same as the issue before Arbitrator Nicolau. *Id.* at 29 n.3 (citing Pet. App. at 49a-50a). Petitioner's argument is specious. The issue that petitioner *sought* and *still seeks* to rearbitrate *is* identical to the issue that was before Arbitrator Nicolau: how the Frontier pilots should be ranked against the Continental pilots. Resolution of that issue involves the same two employee groups and arises out of the same September 15, 1986 transaction. The involvement of the People Express pilots in the instant litigation does not change the identity of the Continental-Frontier dispute that the Frontier Pilots want to rearbitrate; it merely adds additional employees who sought to arbitrate *their* seniority vis-a-vis the Continental pilots.

contrary, there is no question but that the 1984 grievances relate to the exact . . . provisions as are the subject of the present grievances."); *Butler Armco Indep. Union v. Armco Inc.*, 701 F.2d 253, 255 (3d Cir. 1983) (affirming district court's submission of dispute over seniority unit merger to arbitration because the party seeking arbitration "was not raising the same arguments in a situation that was 'materially the same' as prior arbitrations, and therefore, [the party] was not attempting to defeat its responsibilities under the previous decisions"); *Oil, Chem. & Atomic Workers v. Ethyl Corp.*, 644 F.2d 1044, 1055 (5th Cir. 1981) ("If it is beyond argument that there is no material difference between the current facts and the facts on which the prior arbitration award was based . . . [t]here would be no reason to submit the current dispute to arbitration.").

III. The District Court's Finding That Petitioner Was Not Prejudiced By The *Ex Parte* Communication Was Not Clearly Erroneous, And The Third Circuit's Affirmance Did Not Sanction A Departure From Accepted Judicial Procedure Or Create A Conflict Among The Circuits.

On the issue of the *ex parte* communication, the district court made a factual finding that the communication "clearly did not prejudice the Frontier Pilots so as to deprive them of 'a fundamentally fair hearing'." Pet. App. at 33a-34a (citation omitted). Petitioner has no evidence that the district court was clearly erroneous in making that factual finding. Instead, petitioner seeks a bright-line rule that *all ex parte* contacts with arbitrators, no matter how brief and inconsequential, should lead to vacation of arbitration awards. Pet. at 48-58. There is no call for an exercise of this Court's supervisory power to establish the rule sought by petitioner, especially where such a rule would interfere with the wide procedural discretion required by labor arbitrators to resolve workplace disputes and would require vacation of arbitral decisions even where no prejudice had arisen from an *ex parte* contact.

Moreover, Third Circuit law is consistent with the Ninth Circuit decision relied upon by petitioner as well as decisions of other lower federal courts on this issue. Where there has been no prejudice to the rights of a party, courts uniformly have refused to vacate arbitration awards involving *ex parte* contacts with an arbitrator.[16] *See Pacific & Arctic Ry. and Navig. Co. v. United Transp. Union*, 952 F.2d 1144, 1149 (9th Cir. 1991)[17]; *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991); *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 57 (3d Cir. 1989); *National Bulk Carriers, Inc. v. Princess Mgmt. Co.*, 597 F.2d 819, 825 (2d Cir. 1979) (court refused to vacate award where, after two-month hearing and lengthy post-arbitration briefing, partial panel member communicated *ex parte* information to neutral arbitrator during deliberation phase; no prejudice occurred since the neutral testified that the communication occurred after his decision had been made); *M & A Elec. Power Coop. v. Local 702, IBEW*, 773 F. Supp. 1259, 1262-63 (E.D. Mo. 1991); *Springfield*

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[16]Petitioner cites two cases that are inapposite. Pet. at 49. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979), merely holds that it was error for an arbitration panel to rely upon evidence not made available to one of the parties in order to assess damages against that party on an issue which was not submitted for arbitration. It was error, the court held, because it "constituted misbehavior by the arbitrators prejudicial to [the party's] rights in violation of 9 U.S.C.A. § 10(c)." *Id.* at 653.

United States Lines v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978), does not even involve arbitration, and it stands for the unsurprising proposition that *ex parte* communications to the Commission which "were employed both to introduce new arguments and positions and to respond to and rebut the arguments . . . made in . . . public filings," and which resulted in "the Commission squarely revers[ing] its position," violated the right of the *public* to participate in public hearings. *Id.* at 537-39.

[17]The facts surrounding the communication with Arbitrator Ross do not suggest even an appearance of impropriety and are in no way comparable to the egregious facts involved in *Pacific & Arctic Railway*, relied upon by petitioner. Pet. at 53.

Terminal Ry. v. United Transp. Union, 767 F. Supp. 333, 347-49 (D. Maine 1991) (*ex parte* communications aimed at acceleration of case or scheduling in general are viewed as less serious intrusions and require strong showing of prejudice to void arbitration award); *Konkar Maritime Enter., S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267, 275 n.9 (S.D.N.Y. 1987).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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